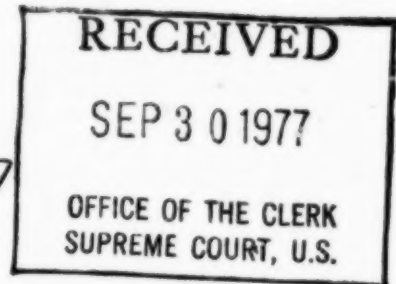

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-497



NEW ORLEANS PUBLIC SERVICE, INC.,
Petitioner,

versus

UNITED STATES _____,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

NEW ORLEANS PUBLIC SERVICE INC.,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, New Orleans Public Service Inc. ("petitioner" or "NOPSI"), respectfully prays for the issuance of an order granting *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on June 6, 1977. Petition for Rehearing was denied by the Court of Appeals on August 17, 1977.

OPINIONS BELOW

The opinion for the Court of Appeals for the Fifth Circuit, dated June 6, 1977, is reported at 553 F.2d 459 and is reprinted in Appendix B hereto. The Notice of

the Order on the Petition for Rehearing is dated August 17, 1977 and appears at Appendix C. The decision of the United States District Court for the Eastern District of Louisiana, dated November 13, 1974, is reported at 8 FEP Cases 1089, and is reproduced in its original form in Appendix A hereto.

JURISDICTION

Plaintiff-respondent brought this action under Executive Order No. 11246, as amended, seeking an injunctive order requiring the defendant-petitioner to allow the General Services Administration or its successor to review defendant's records in order to determine defendant's compliance with Executive Order No. 11246. The District Court found that NOPSI was a contractor of the Federal government, within the scope of and, therefore, subject to, the provisions of Executive Order No. 11246. A general injunctive order was issued permanently enjoining and restraining petitioner from failing or refusing to comply with Executive Order No. 11246 and requiring NOPSI to permit the General Services Administration or its successor to conduct compliance reviews by entry upon NOPSI's property to inspect the company's facilities, to examine and copy its books, records, accounts and other material. The District Court retained jurisdiction of the action to insure petitioner's compliance with Executive Order No. 11246 and also for a trial regarding NOPSI's substantive compliance with the Executive Order should a trial be found necessary.

The judgment of the Court of Appeals affirmed the District Court's decision but modified that part of the order in which jurisdiction was retained over the suit and which dictated a mandate of injunction con-

templating substantive enforcement of the Executive Order. The decision of the Court of Appeals was rendered on June 6, 1977, and petitioner's timely Petition for Rehearing was denied on August 17, 1977. This petition for *certiorari* is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an agency of the Executive Branch has the power, in the absence of express statutory authority from the Congress, to require that non-consenting private companies be exposed to legal actions for reverse discrimination under the Federal Civil Rights Acts by promulgating substantive and procedural regulations requiring such employers to undertake affirmative action that modifies employment practices and alters incumbent employees' rights and expectations to conform with discretionary agency requirements.
2. Whether an agency of the Federal government acting without express legislative authority violates the due process and equal protection guarantees under the Fifth Amendment to the Constitution when it directs a public utility which has refused to become a government contractor and expressly rejected the affirmative action obligations of Executive Order No. 11246 to undertake affirmative action that will reform its employment practices to conform with the agency's discretionary requirements.
3. Whether the opinion of the Court of Appeals below conflicts with the decisions of this Court which mandate compliance with the Fourth Amendment

warrant requirement before an administrative agency of the Federal government may validly conduct a non-consensual inspection of the facilities, books and records of a privately-owned corporation.

CONSTITUTIONAL PROVISIONS, STATUTE, EXECUTIVE ORDER AND REGULATIONS INVOLVED

The constitutional provisions involved are Amendments IV and V to the United States Constitution.

The statute involved is 40 U.S.C. §486.

The executive order involved is Executive Order No. 11246, as amended.

The regulations involved are 41 C.F.R. §60-1.3, 41 C.F.R. §60-1.4 and 41 C.F.R. §60-1.43 as promulgated by the U.S. Department of Labor.

Each of the above is set out verbatim in Appendix D.

STATEMENT OF FACTS

New Orleans Public Service Inc. is a privately-owned Louisiana corporation and public utility which is engaged in the production, distribution and sale of electrical power to consumers located in New Orleans, Louisiana, on the East Bank of the Mississippi River, and in the sale and distribution of natural gas to users throughout New Orleans. Pursuant to indeterminate permits granted by the City Council of New Or-

leans, NOPSI is permitted to sell electricity and gas to consumers within the above-described areas of New Orleans. The New Orleans City Council regulates the rates for utilities which may be charged by NOPSI and has granted no additional indeterminate permits in the above-described area with respect to the supply of gas or electric utility service. Consumers of electrical services located in New Orleans on the East Bank of the Mississippi River must obtain such services from NOPSI.

The District Court concluded that NOPSI supplies the Government with utility services pursuant to various contractual arrangements. The court found that NOPSI supplies twenty-eight (28) Federal agencies under certain written and oral agreements. Some of the contracts were found to have predated the Executive Order but were modified in part by a 1973 revised rate schedule authorized by the City Council of New Orleans and accepted by the government through payment of the increased rate by the various agencies. In addition, the District Court found that a few of these agreements had contained certain non-discrimination clauses required by earlier executive orders. However, when the government submitted to NOPSI proposed new contracts containing the non-discrimination clause required by Executive Order No. 11246, NOPSI consistently rejected them on the ground that the proposed clause was completely unsatisfactory to the company.

Of particular concern to both the District Court and the Court of Appeals were the agreements between NOPSI and the National Aeronautics and Space Administration's Michoud Assembly Facility ("NASA" or "MAF"). The original agreement between NOPSI

and NASA for electric service to NASA's Michoud Assembly Facility was effective from September 1, 1965 through June 30, 1970. Section One of this contract provided that the equal employment opportunity provisions of Section 202 of Executive Order No. 11246 were to be limited in application to the Michoud Assembly Facility and the employees of NOPSI engaged solely in providing services to MAF.

In 1969 the Defense Supply Agency, pursuant to a request by NASA, advised NOPSI that it desired to evaluate NOPSI's compliance with Executive Order No. 11246. NOPSI responded that since the contract with NASA, including the equal opportunity clause contained therein, applied solely to MAF where NOPSI had no employees and none of its employees were engaged in work solely to provide services to MAF, there was no contractual basis for the Defense Supply Agency to conduct a compliance review of NOPSI.

Subsequent to the Defense Supply Agency's request to conduct a compliance review, NASA submitted to NOPSI a revised contract for providing electric and natural gas service to MAF for the period July 1, 1970 through June 30, 1971. The revised contract proposed to delete the limited application of the original contract terms to NASA's Michoud operations. However, NOPSI and NASA were unable to reach an agreement with respect to the scope of the new contract causing the original contract to expire on June 30, 1970 without any agreement. In accordance with its obligations under the franchise granted by the City Council of New Orleans, and with the clear understanding that the Federal government would comply with the applicable rate schedule, NOPSI continued to provide gas and electric service to NASA's MAF without further contractual agreements.

The General Services Administration thereafter notified NOPSI on March 15, 1971 that it desired to conduct a review of the company's compliance with Executive Order No. 11246. NOPSI declined the General Services Administration's request since it had no effective government contracts in which it had agreed to be subject to the provisions of Executive Order No. 11246.

In a letter dated July 25, 1972 from the Director of the Office of Federal Contract Compliance ("OFCC"), NOPSI was advised that it was subject to Executive Order No. 11246 in view of its agreement to supply gas and electric service to NASA's Michoud Assembly Facility. This determination was made by the acting OFCC Director without prior notice to NOPSI or an opportunity to be heard.

An action was then instituted in the United States District Court for the Eastern District of Louisiana to enforce the *ex parte* ruling by the Acting Director, OFCC. In affirming the holding of the District Court that NOPSI was a Federal government contractor and subject to the Executive Order, the United States Court of Appeals for the Fifth Circuit held that an administrative agency in the Executive Branch of the Federal government could compel a public utility to comply with the equal opportunity and affirmative action obligations of Executive Order No. 11246 whether or not the public utility had consented to be bound by that Order. The decision of the Court of Appeals was based solely upon a finding that NOPSI enjoys "special economic advantages" and that NOPSI sold its services directly to the Federal government. The Court further held that the sale of energy to the gov-

ernment alone was sufficient to invoke the operation of Executive Order No. 11246 and the implementing regulations of the Secretary of Labor.

REASONS FOR GRANTING THE WRIT:

I.

Whether An Agency Of The Executive Branch Has The Power, In The Absence Of Express Statutory Authority From The Congress, To Require That Non-Consenting Private Companies Be Exposed To Legal Actions For Reverse Discrimination Under The Federal Civil Rights Acts By Promulgating Substantive And Procedural Regulations Requiring Such Employers To Undertake Affirmative Action That Modifies Employment Practices And Alters Incumbent Employees' Rights And Expectations To Conform With Discretionary Agency Requirements.

The Court of Appeals found support in holding NOPSI to be a contractor of the Federal government, and thus subject to the rules and regulations promulgated by the Office of Federal Contracts Compliance, in two areas of congressional legislation. Reliance was initially placed on the authority granted to the President and heads of Executive agencies by Congress to create a body of rules and regulations implementing the statutes dealing with Federal procurement practices. See, 40 U.S.C. §486(a). As additional support justifying application of Executive Order No. 11246, the Court referred to Title VII of the Civil Rights Act of 1964 and the debates concerning the enactment of the Equal Employment Opportunity Act of 1972. See, 42 U.S.C. §2000e et seq.

As a general rule, when a statute enacted by Congress indicates that the appropriate agency of the Federal government may make those rules and regulations which may be considered necessary to carry out the statute's provisions, the validity of those regulations promulgated pursuant to the statute will be upheld if they are "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318, 330 (1973). It should be carefully noted that an administrative officer's power to administer a Federal statute and to prescribe rules and regulations in connection therewith is clearly not the power to make law but rather the power to make those regulations which set forth the will of Congress as expressed in the statute. It follows, therefore, that a regulation which creates a rule which cannot be harmonized with the statute is null and void. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528, 531 (1936).

Petitioner fully recognizes that agencies of the Federal government, whether created by statute or executive order, must have the freedom to give reasonable scope to the terms conferring their authority. This does not mean, however, that such agencies are free to ignore limitations placed on that authority. *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129, 1141 (1955). It therefore follows that a regulation promulgated pursuant to an executive order will only be considered valid if it is not inconsistent with the provisions of the executive order itself. See, *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129, 1139 (1955).

As previously indicated, the Fifth Circuit found statutory support for the Secretary of Labor's Federal contract compliance program in the Federal procurement statutes. Petitioner submits that the Federal procurement statutes only contemplate application to companies which actively desire to bid on or in fact receive government contracts. It does not, in the mind of the petitioner, apply to companies which hold no contracts with the Federal government or refuse to agree to certain contractual terms and conditions sought to be injected into purported contracts with the Federal government. For example, in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971); *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971), the court therein dealt with the validity of regulations promulgated pursuant to Executive Order No. 11246 which required bidders on certain Federal or Federally assisted construction contracts to submit affirmative action plans. In its decision, the Third Circuit Court of Appeals opined:

"... We have said hereinabove that in imposing the affirmative action requirement on federally assisted construction contracts the President acted within his implied contracting authority. *The assisted agency may either agree to do business with contractors who will comply with the affirmative action covenant, or forego assistance. The prospective contractors may either agree to undertake the affirmative action covenant, or forego bidding on federally assisted work...*

* * *

"... Plaintiffs are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. . . ." (Emphasis supplied) 442 F.2d at 174, 176.

Also, in *Joyce v. McCrane*, 320 F.Supp. 1284 (D.N.J. 1970), the court noted that the fundamental principle underlying the presidential power to require non-discrimination by contractors is the power of the Federal government to set conditions upon which anyone *desiring to do business with the United States* must meet. 320 F.Supp. at 1290.

As stated heretofore, the determination of the Office of Federal Contracts Compliance and the holdings of the lower courts seek to force NOPSI into the status of a government contractor. Notwithstanding, NOPSI has refused to accept such status and the company has repeatedly declared that as a public utility, it is required to provide gas and electric service to all customers who request such service. Furthermore, respecting NOPSI's arrangement with NASA, NOPSI consistently refused to enter into a renewed contract with the government without the express provisions limiting application of the agreement to the Michoud Assembly Facility. In short, NOPSI made it abundantly clear to the Federal government that it adamantly opposed incorporation of the provisions of Executive Order No. 11246 into any of its agreements to supply the government with utility services.

Since the Federal procurement statutes as well as Executive Order No. 11246 contemplate application to

those companies or persons who actively desire to bid on or in fact receive government contracts, there is no provision in the procurement statutes or Executive Order No. 11246 which necessitates a determination that NOPSI is a Federal government contractor simply because it undertakes to supply utility services to the Federal government pursuant to a franchise granted by a municipal government. Under the express provisions of its franchise, NOPSI is *mandated* to supply utility services to any person or entity which requests the same. Thus, the situation herein is distinctly different from that of an individual actively seeking a contract to be let by the Federal government. For this Court to uphold the ruling of the Circuit Court would be to undermine the framework of the Federal procurement statutes which contemplate bidding or negotiation for Federal contracts. Congress sought to allow the President and administrative agencies in the Executive Branch to set conditions for those desiring to do business with the Federal government, not for those entities which have a pre-existing legal duty to supply services to anyone, including the Federal government.

Petitioner further submits that Congress has not expressly or impliedly ratified the particular facet of the Executive Order program presently before this Court. Since Congress normally legislates only the framework and not the details, those persons, who participate in amending a statute may lack knowledge of the content of outstanding regulations so that amendment may be a meaningless source of authority with respect to legislative intent. See, K. Davis, *Administrative Law Text*, §5.04 at 132 (3rd Ed. 1972). As stated in *Sims v. United States*, 252 F.2d 434 (4th Cir. 1958); *aff'd*, 359 U.S. 108, 79 S.Ct. 641, 3 L.Ed.2d 667 (1959):

"Administrative interpretations are not absolute rules of law which must necessarily be followed in every instance, but are only helpful guides to aid courts in their task of statutory construction. The extent to which a court will place reliance on administrative interpretation depends on the circumstances, including the general purpose of the act, the authoritative source of the regulation or ruling, the clarity of the statutory language, the consistency of administrative policy, and *whether administrative interpretation was brought to the attention of the legislators when they re-enacted, modified, or refused to change the statute.*" (Emphasis supplied) (Citations omitted) 252 F.2d at 438.

In its opinion, the Fifth Circuit found that Congress had impliedly ratified the Executive Order program when it enacted Title VII of the Civil Rights Act of 1964. As further evidence indicating congressional ratification of the program, the Court referred to the debates surrounding the Equal Employment Opportunity Act of 1972 which amended Title VII. Nevertheless, the Court of Appeals conceded that Congress had not *specifically* ratified the particular provision of the Executive Order program at issue before this Court, i.e., the imposition, by operation of the Order, of a non-discrimination clause upon a public utility supplying energy to the Federal government regardless of whether the company had expressly consented to be bound by the Order or the clause contained therein. See, 41 C.F.R. §60-1.4(c). Since there is no indication that this particular interpretation was brought to the attention of the legislators when Title VII was amended in 1972, petitioner asserts that the

administrative interpretation of the Secretary of Labor at issue lacks the purported congressional sanction or ratification found by the Fifth Circuit.

It is a curious development indeed that in Title VI of the Civil Rights Act of 1964 Congress provided in part:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . ." (Emphasis supplied) 42 U.S.C. §2000d-1.

However, neither Title VII as originally enacted nor the 1972 amendments thereto contain a similar delegation of authority to the departments or agencies responsible for the implementation and administration of the program regarding non-discrimination in

the performance of Federal government contracts. Petitioner is therefore of the belief that the absence of specific congressional authorization for the promulgation of rules, regulations or orders with respect to the Executive Order program raises the question of the validity of the lower courts' holding that there is congressional sanction for the administrative interpretation given the Executive Order by the Secretary of Labor. In this connection, this Court has recently held that an administrative agency of the Federal government must have congressional authorization in order to promulgate binding substantive rules. *General Electric Co. v. Gilbert*, ____ U.S. ____, 97 S.Ct. 401, 50 L.Ed.2d 342 (1976).

Although the Court of Appeals below found legislative support in Title VII for the Executive Order program, the Secretary of Labor recently indicated in a memorandum of law filed in the United States District Court for the Eastern District of Louisiana* that Title VII of the Civil Rights Act of 1964 does not constitute a limitation on the Executive Order program. Clearly, the Secretary of Labor cannot have it both ways. He cannot on the one hand seek implied authority for the Executive Order program by looking to congressional ratification of the program in Title VII and then, on the other, declare that Title VII does not act as a limitation on the scope of the Executive Order program.

Congress has never expressly conferred upon the Secretary of Labor, pursuant to statute or otherwise, the authority to promulgate any rules or regulations

* The memorandum of law was filed in the suit entitled *Crown Zellerbach Corp. v. Marshall*, C.A. No. 77-1833 (E.D. La. 1977) and is reproduced in Appendix E.

with respect to the employment practices of companies supplying energy to the government via franchise. Indeed, this Court has itself indicated that only Congress can authorize a Federal agency to combat employment discrimination. See, *NAACP v. FPC*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976). In his concurring opinion in *NAACP v. FPC*, Mr. Chief Justice Burger stated:

"... If Congress had mandated duplicative regulation, the result, however inefficient, would be none of our concern. But Congress did not do so. It centralized responsibility in the Equal Employment Opportunity Commission. To the extent that the judiciary orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly. To suggest, for example, that the FPC could deny a license on account of a regulatee's discriminatory employment practices, is to thrust the Commission into a complex, volatile area for which Congress has already assigned authority to the EEOC." (Citation omitted) 48 L.Ed.2d at 294.

The statutory authorization for an agency of the Executive Branch to monitor and challenge the employment practices of covered employers has been granted exclusively to the EEOC and not to the U.S. Department of Labor. If the decision of the Court of Appeals is allowed to stand, administrative responsibility for

equal employment opportunity will be diffused contrary to the will of Congress. Petitioner is already a covered employer under Title VII, but its coverage under Executive Order No. 11246, in view of its refusal to agree to the equal employment opportunity provisions thereof, is wholly unwarranted. The decision of the Court of Appeals in this case is far reaching indeed. It is inconceivable that a company which has plainly not agreed to be bound by equal opportunity provisions of an executive order should be required to comply with such requirements as the development of an affirmative action plan, see 41 C.F.R. §60-1.40, a matter which has already grasped the attention of this Court. See, *Regents of University of California v. Bakke*, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976); cert. granted, ___ U.S. ___, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977). The Fifth Circuit's decision, in effect, permits the Executive Branch to flaunt its authority in the area of equal employment opportunity contrary to existing congressional regulation.

NOPSI's claim of exposure to actions for "reverse" discrimination as a result of affirmative action requirements is not without basis and legal precedent. In *Hefner v. NOPSI*, ___ F.Supp. ___, 14 FEP Cases 826 (E.D. La. 1977), petitioner was cast as a defendant in a lawsuit instituted by a white employee who claimed that he had been subjected to "reverse" discrimination on account of NOPSI's affirmative actions taken with respect to black employees pursuant to court order. Petitioner believes that unless it specifically agrees to do so, it should not be subjected to affirmative action mandates of the Federal government which alter incumbent employees' rights and expectations and unnecessarily expose NOPSI to further "reverse" discrimination suits instituted by non-minority employees.

Petitioner does not question or belittle the importance of the objectives of Executive Order No. 11246. However, in the absence of specific congressional sanction, the Executive Branch cannot justify its exercise of the power it has assumed for the purpose of carrying out a laudable social objective, particularly when the exercise of the assumed power by an administrative agency of the Executive Branch infringes upon significant constitutional guarantees.

II.

Whether An Agency Of The Federal Government Acting Without Express Legislative Authority Violates The Due Process And Equal Protection Guarantees Under The Fifth Amendment To The Constitution When It Directs A Public Utility Which Has Refused To Become A Government Contractor And Expressly Rejected The Affirmative Action Obligations Of Executive Order No. 11246 To Undertake Affirmative Action That Will Reform Its Employment Practices To Conform With The Agency's Discretionary Requirements.

Rights arising out of contracts with the United States are protected by the Fifth Amendment. Normally, when the Federal government enters into contractual relations, its rights and duties therein are to be governed by the law which is generally applicable to contracts entered into between private individuals. *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434, 1440 (1934). See also, *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474, 482, n. 31 (1969); *S.R.A., Inc. v. Minnesota*,

327 U.S. 558, 66 S.Ct. 349, 90 L.Ed. 851, 857 (1946); *Hollerbach v. United States*, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898, 901 (1914). It follows, therefore, that there must be a meeting of the minds between contracting parties, an offer and acceptance of that offer, as well as adequate consideration.

The decision of the Fifth Circuit Court of Appeals wholly ignores the fact that NOPSI has consistently refused to assent to the Federal government's proposal that any contract with NOPSI contain the equal opportunity provisions in the Executive Order. Arms length negotiations were held between the parties, and during these negotiations, the parties failed to agree as to the applicability of the equal opportunity provisions of the Executive Order to NOPSI. In sum, there was no "meeting of the minds" as to a provision of the proposed contract, and, therefore, a contract binding on the parties was never perfected. No court should now be called upon to create an agreement which never existed.

Furthermore, as Judge Clark's dissenting opinion correctly notes, NOPSI is legally obligated under its franchise with the City Council of New Orleans to provide gas and electricity services to those persons and entities desiring such service. Consequently, in light of a pre-existing legal obligation on the part of NOPSI, no valid consideration can be said to exist which would support any purported contract between NOPSI and the Federal government. 553 F.2d at 478. In the absence of a binding contract, NOPSI cannot be characterized as a government contractor, and, hence, Executive Order No. 11246 has no applicability.

However, if this Court should concur in the opinion rendered below that a valid contractual relationship existed between the United States and NOPSI, then it should additionally recognize the fact that petitioner only agreed to application of the provisions of the Executive Order insofar as they were to apply to the NASA Michoud Assembly Facility and to those employees of NOPSI engaged exclusively in providing services to that facility. While, admittedly, NOPSI was a party to several written agreements to provide utility services to the Federal government, the Fifth Circuit Court of Appeals held that NOPSI's consent to the Executive Order was not determinative. 553 F.2d at 469. The lower court held that it would find a contractual relationship "even in the absence of any oral or written agreements to particular terms, because the relationship so clearly reflects a contract." *Id.* Although the Court of Appeals placed some significance on the fact that the revised utility rate schedules of NOPSI were accepted through payment by the Federal government, NOPSI never agreed to abide by the provisions of Executive Order No. 11246 in connection with the modification of the rate schedules.

The United States government is as bound by the provisions of its contracts as is any private individual. *See, Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434, 1441 (1934). A deprivation of liberty, *i.e.*, the right to contract, and property, without due process of law under the Fifth Amendment, exists when the government seeks to unilaterally impose a requirement which it could not successfully negotiate into a contract with a public utility which consistently refused to consent to the inclusion of the requirement

in the purported contract with the government. Further, it has never been shown that the government is in fact limited in its ability to obtain gas and electricity services from a source other than petitioner.

Although no equal protection clause as such is found in the Fifth Amendment, it is the established jurisprudence of this Court that the Amendment prohibits discrimination which is "so unjustifiable as to be violative of due process". *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514, 519, n. 2 (1975). *See also, Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964). The right to equal protection denies the government the power to enact legislation which mandates that unequal treatment be accorded to persons who are placed in different statutory classifications on the basis of criteria wholly unrelated to the object of the particular statute. Thus, the classification is required to be reasonable and to rest upon a ground of difference which has a fair and substantial relationship to the legislative objective in order that all similarly situated persons will be treated in the same manner. *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389, 402 (1974). The same test to determine the constitutionality of statutory classifications must likewise apply to regulatory classifications established pursuant to Executive Order No. 11246.

It is axiomatic that regulations promulgated pursuant to an executive order, in order to have the force and effect of law, must be constitutional. *See, K. Davis, Administrative Law Text*, §5.03 at 126 (3rd Ed. 1972). As this Court stated in *FCC v. Schreiber*, 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965):

"... [I]n providing for judicial review of administrative procedural rule-making, Congress has not empowered district courts to substitute their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution." (Citations omitted) 14 L.Ed.2d at 392.

The regulations promulgated by the Secretary of Labor, implementing the Executive Order compliance and affirmative action program, particularly 41 C.F.R. §60-1.4(e), seek to place public utilities, holding city granted franchises, into a different classification than other commercial enterprises on the basis of criteria wholly unrelated to the objectives of the Executive Order program, the purpose of which is to insure that Federal government contractors provide equal employment opportunity. Normally, a Federal agency may either agree to do business with prospective contractors who comply with the equal opportunity provisions of the Executive Order or refuse to consider the contractor in connection with the particular government contract. In the same vein, prospective contractors may either agree to undertake the equal opportunity provisions of the Executive Order or forego bidding on Federal contracts on the basis that it is simply not worth the price. If a prospective contractor refuses to agree to a particular provision which the government requires to be inserted in a proposed contract, the contractor will be denied the contract. Each party, consequently, has the freedom to choose whether or not to contract with the other.

Petitioner submits that no rational basis exists upon which to make a distinction between ordinary businesses which elect to do or not to do business with the Federal government and public utilities which are required to provide their services to the Federal government pursuant to a municipally granted franchise. The regulation of the Secretary of Labor defining "Government contract", 41 C.F.R. §60-1.3, indicates that any person who supplies services is to be considered a government contractor within the scope of the Executive Order. The term, "services", is deemed to include "[u]tility, construction, transportation, research, insurance, and fund depository". 41 C.F.R. §60-1.3. In each of the above, with the exception of a utility operating pursuant to franchise, the person offering to perform the service is not legally bound to provide the same. Further, such individuals have the opportunity, unlike the public utility, to negotiate those terms and conditions to be included in any purported contract with the government or to walk away from the bargaining table if agreement on the contractual provisions cannot be reached.

Unquestionably, NOPSI was neither a bidder on any Federal government contract nor the recipient of any Federal assistance. The course of lengthy negotiations with the government indicated that petitioner repeatedly refused to agree to the inclusion of the equal opportunity provisions of the Executive Order in any agreement, implied or express. A denial of equal protection and due process rights exists, therefore, when the government forces a public utility to become a government contractor and assent to provisions to which it clearly did not agree whereas ordinary business enterprises may decide whether

they wish to do business with the government through the bidding process or negotiation.

It must be reemphasized that petitioner is only supplying utility services to the government in accordance with its franchise granted by the City Council of New Orleans. The government has accepted these utility services with the full knowledge of NOPSI's refusal to incorporate the equal opportunity provisions of the Executive Order into any written or oral understanding in connection with the supply of these services. Fundamental and basic notions of due process and equal protection are violated when a private enterprise is forced to comply with provisions of an executive order which are wholly inapplicable.

III.

The Opinion Of The Court Of Appeals Conflicts With The Decisions Of This Court Which Mandate Compliance With The Fourth Amendment Warrant Requirement Before An Administrative Agency Of The Federal Government May Validly Conduct A Non-Consensual Inspection Of The Facilities, Books And Records Of A Privately-Owned Corporation.

The decision of the Fifth Circuit Court of Appeals holds that an administrative investigation may validly be conducted under the aegis of Section 202(5) of Executive Order No. 11246 and the regulations promulgated thereunder, specifically 41 C.F.R. §60-1.43, without violating the protections against unreasonable search and seizure guaranteed by the Fourth

Amendment. Such a holding is in direct conflict with the principles first enunciated by this Court in the companion cases of *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) and *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). These decisions rest upon the proposition that "while non consensual administrative inspections of commercial premises are authorized, such inspections may only be accomplished upon presentation of a warrant based upon satisfaction of a flexible probable cause standard." *Usery v. Centrif-Air Machine Co.*, 424 F.Supp. 959, 961 (N.D. Ga. 1977). The rule expounded in these cases solidly survives today, having been expressly reaffirmed by this Court in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974) and generally relied upon as authority in *G. M. Leasing Corp. v. United States*, ___ U.S. ___, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977).

The Fifth Circuit has fallen victim to the mistaken belief that certain decisions subsequent to *Camara* and *See*, particularly the decisions of *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) and *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), have, in effect, eroded the holdings of *Camara* and *See* to permit a less restrictive approach toward non-consensual administrative inspections. Petitioner submits that the interpretation given to these cases by the Fifth Circuit is erroneous and that the more recent decisions of this Court support the conclusion that the opinions of *Camara-See* and *Colonnade-Biswell* exist harmoniously juxtaposed; each announcing a separate standard by which the validity of a non-

consensual, warrantless search conducted by an administrative agency is to be judged under the Fourth Amendment.

The opinion of the Court of Appeals fails to recognize the distinguishing characteristics contained in the language of these decisions. For while *Camara* and *See* announce the general rules applicable to administrative searches, *Colonnade* and *Biswell* create a narrow exception to their application. Petitioner asserts that in order to trigger the *Colonnade-Biswell* exception certain identifiable factors must exist. Moreover, the presence of each factor is essential in order to meet the reasonableness requirement of the Fourth Amendment and the absence of any one forces a determination of the question under the principles announced in *Camara* and *See*.

Those factors considered by this Court to be essential in order to invoke application of the *Colonnade-Biswell* exception were crystalized by Mr. Justice White in the *Biswell* decision wherein he stated:

"... [W]here . . . regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." 32 L.Ed.2d at 93.

A host of lower court decisions have had occasion to interpret this language and support petitioner's contention that warrantless administrative searches should be upheld only in "narrowly defined contexts and for limited purposes . . ." *Brennan v. Gibson*

Products, Inc. of Plano, 407 F.Supp. 154, 159 (E.D. Tex. 1976). Application of the exception created by *Colonnade-Biswell* was reviewed at length in *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. N.M. 1976) wherein the court observed:

"[We] find . . . that a more restrictive reading of the *Colonnade* and *Biswell* cases is required, especially in light of the Supreme Court's recent pronouncements in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) and *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 864, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). Thus, it is concluded that *Colonnade* and *Biswell* create a narrow exception to the general *Camara-See* rule requiring that objected to administrative inspections be conducted only within the framework of a warrant procedure.

"The *Colonnade-Biswell* [sic] exception is applicable only if certain factors identified by the Supreme Court are present in a particular case . . . First, the enterprise sought to be inspected must be engaged in a pervasively regulated business . . . Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest . . . And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited as to time, place and scope." 418 F. Supp. at 631-2.

See also, *Usery v. Centrif-Air Machine Co.*, 424 F.Supp. 959 (N.D. Ga. 1977); *Barlow, Inc. v. Usery*, 424 F.Supp. 437 (D. Idaho 1976); *prob. juris. noted*, ____ U.S. ____, 97 S.Ct. 1642, 52 L.Ed.2d 354 (1977).

A careful analysis of the facts surrounding the instant case demonstrates the absence of the criteria necessary to trigger application of the *Biswell* rationale. Petitioner submits that although NOPSI is a public utility, it is neither engaged in a "pervasively regulated business" nor is it licensed by the Federal government. Federal regulation of industries similar to those considered by this Court in *Colonnade* and *Biswell* is extensive, and such regulation is fully anticipated by those who choose to engage in them. NOPSI, however, is not engaged in an industry extensively regulated by the Federal government nor has it undertaken to provide the government with utility services with the expectation that it would be subject to regulation, much less warrantless searches. To again employ the language of this Court in *Biswell*:

"... When a [gun] dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection." 32 L.Ed.2d at 92-93.

The distinctions existing between a Federally licensed firearms' dealer and a public utility which only incidentally supplies the government's energy needs are patently obvious. When an individual in the firearm industry applies for and receives the appropriate Federal license, he does so with the realization that he

is engaging in an enterprise which is pervasively regulated by the Federal government. He accepts the license with complete knowledge of the statutory restrictions placed upon his activities and recognizes that further limitations may follow. The same cannot be said of NOPSI. It neither operates pursuant to a Federal license nor has reason to expect Federal intrusion into matters otherwise protected by the Fourth Amendment.

The decision of the lower court mistakenly equates the government's "vital interest in achieving equal employment opportunity" with the requirement in *Biswell* that the warrantless inspection be "a crucial part of the regulatory scheme." 32 L.Ed.2d at 92. In doing so, the Fifth Circuit completely ignores the fact that in some situations searches must be conducted without a warrant, while in others, there is no such urgency. Again, the *Biswell* Court, in reconciling its position with the holding in *See*, deemed this distinction crucial:

"... In *See v. City of Seattle*, the mission of the inspection system was to discover and correct violations of the building code, *conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue* ... Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." (Emphasis supplied) (Citations omitted) 32 L. Ed. 2d at 92.

Obviously, the employment practices of NOPSI are not subject to sudden alteration. Discriminatory employment practices would certainly be more difficult to conceal or correct in a short period of time than the building code violations in *See*. The underlying rationale of a warrantless search rests in the need to engage in an unannounced inspection, but no such need exists in this case. Thus, the proper course for the United States, given the character of the enterprise involved, is to obtain a warrant to gain access in order to determine compliance with the Executive Order, if it is applicable. In sum, the warrantless inspection system which the Fifth Circuit holds is properly mandated by the Executive Order does not constitute "a crucial part of a regulatory scheme designed to further an urgent federal interest." *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. at 631-2.

Petitioner is willing to concede that a lawfully promulgated executive order carries with it the full force and effect of law; however, it is quite a different matter to state that such an executive order and regulations enacted thereunder are statutes when, in fact, they are not. *See, EEOC v. American Telephone and Telegraph Co.*, 506 F.2d 735, 740 (3rd Cir. 1974). The Fifth Circuit has inexplicably failed to recognize this fundamental distinction. In doing so, the Court completely ignored the language of the *Biswell* decision which it cites as controlling authority. This Court there observed that "... [an administrative] inspection may proceed without a warrant where specifically authorized by statute." (Emphasis supplied) 32 L.Ed.2d at 93. And again in *See*, this Court stated that an "... agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute ..." (Emphasis supplied) 18

L.Ed.2d at 947. Petitioner contends that by disregarding the language of these decisions which recognize this factor as a central limitation on the authority of an administrative agency to conduct warrantless searches of commercial premises, the Fifth Circuit has permitted a needless and dangerous expansion of Executive authority in the realm of administrative procedure.

The recent decision in *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), wherein electronic surveillance ordered by the Executive was disallowed, provides additional basis for the proposition that the Executive cannot constitutionally order warrantless searches:

"... Inherent in the concept of a warrant is its issuance by a 'neutral and detached Magistrate' ...

"... The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and prosecute ... The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions to privacy and protected speech." (Citation omitted) 32 L.Ed.2d at 766.

Moreover, the authority of Congress to proceed in such instances, subject to certain constitutional restraints, is supported by the Court in the above-cited opinion:

"It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of §2518 [Omnibus Crime Control and Safe Streets Act] but should allege other circumstances more appropriate to domestic security cases . . .

"... We do hold . . . that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe." (Emphasis supplied) 32 L.Ed.2d at 770.

The *United States v. United States District Court* decision clearly establishes that while Congress may enact legislation authorizing search and seizure, the Executive does not have such power. Hence, Executive Order No. 11246, as amended, does not provide the necessary authority to compel a warrantless search by an agency of the Federal government.

There is no conceivable overriding policy requiring NOPSI to be subjected to non-consensual warrantless searches pursuant to Executive Order No. 11246. The rights guaranteed to NOPSI under the Fourth Amendment to the Constitution are seriously threatened when an administrative agency of the Federal government, acting pursuant to the authority of an executive order, can unilaterally demand access to the facilities, books and records of the company without first obtaining a constitutionally valid search warrant. The evils sought to be controlled by this Court in *Biswell* are simply not present in this case. For this Court to

sanction the unwarranted expansion of the narrow exception created by *Biswell* would be a dangerous erosion of the foundation upon which the Fourth Amendment rests.

CONCLUSION

For the foregoing reasons and arguments, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon the following counsel of record for Respondent by depositing said copy, postage prepaid and properly addressed, in the United States mail this ~~24~~ day of September, 1977:

Mr. David L. Rose
Mr. Louis G. Ferrand, Jr.
U.S. Department of Justice
Civil Rights Division
Employment Section
Washington, D.C. 20530

Mr. Gerald J. Gallinghouse
United States Attorney
500 Camp Street
New Orleans, Louisiana 70130

Mr. Wade H. McCree, Jr.
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

September 29, 1977.

Michael J. Maloney, Jr.
Counsel for Petitioner

APPENDICES

APPENDIX A

OPINION AND ORDER OF THE DISTRICT COURT

**United States District Court
Eastern District of Louisiana**

**UNITED STATES OF AMERICA,
Plaintiff,**

**versus CA NO. 73-1297
SECTION "E"**

**NEW ORLEANS PUBLIC SERVICE, INC.
Defendant.**

This action was initiated by the United States Department of Justice to enforce certain contractual obligations imposed by Executive Order 11246, as amended, 30 F.R. 12319 (hereinafter Executive Order 11246), and the Rules and Regulations issued pursuant thereto, 41 C.F.R. 60-1 et seq. and to seek relief for their violation. The complaint alleged that the defendant, the New Orleans Public Service, Inc. (hereinafter NOPSI) is a contractor within the meaning of 41 C.F.R. 60, and at all material times has been subject to Executive Order 11246, and all implementing regulations issued thereunder. The complaint also alleged that NOPSI had violated Executive Order 11246 by failing and refusing to comply with its provisions.

NOPSI, in its answer, admitted that it had failed and refused to comply with the provisions of Executive Order 11246 and the Rules and Regulations issued pursuant thereto, but asserted that it was not subject to

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Executive Order 11246 because "since 1970, no contract, either written or oral, [had] existed between it and the United States or any of its agencies".

The Court, pursuant to Fed.R.Civ.P. 42(b), severed the issue of whether NOPSI was a Government contractor subject to Executive Order 11246, and the Rules and Regulations issued pursuant thereto, from all other issues in the case.

A two day trial was held on the issue of whether NOPSI was a Government contractor subject to Executive Order 11246, and the Rules and Regulations issued pursuant thereto. At the close of all the evidence the Court held that NOPSI was a Government contractor, subject to Executive Order 11246. The Court took under submission the United States' request for an injunction restraining NOPSI from failing or refusing to comply with Executive Order 11246 and requiring NOPSI to undertake with the General Services Administration a compliance review on NOPSI's property.

The Court, after due consideration of the evidence adduced at trial, briefs submitted by counsel, and the law, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.

NOPSI is incorporated under the laws of the State of Louisiana and is engaged as a public utility in the business of production, distribution and sale of elec-

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trical power to consumers on the East Bank of the Mississippi River in the City of New Orleans, Louisiana, and in the sale and distribution of natural gas to consumers in the City of New Orleans, Louisiana.

2.

NOPSI is regulated by the City Council of the City of New Orleans. The City Council has issued NOPSI an indeterminate permit (or franchise) to sell electricity to consumers in the City of New Orleans who are located on the East Bank of the Mississippi River, and it has issued NOPSI an indeterminate permit to sell natural gas to consumers throughout the City of New Orleans.

3.

The difference between an indeterminate permit and a franchise is that under a franchise a company is granted the right to supply utility services to consumers for a fixed period of time, while under an indeterminate permit a company is granted the right to supply such services indefinitely but with a right in the grantor (the City Council) to buy the utility operation from the Company and thus terminate the indeterminate permit.

4.

NOPSI received its electrical and natural gas indeterminate permits from the City Council of the City of New Orleans in 1922.

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5.

NOPSI is the sole company which has an indeterminate permit from the City Council of the City of New Orleans for the supply of electrical utility services to consumers in the City of New Orleans who are located on the East Bank of the Mississippi River.

6.

A consumer located on the East Bank of the Mississippi River in the City of New Orleans, who wishes to obtain electrical utility service, must obtain such service from NOPSI.

7.

All federal agencies, including the National Aeronautics and Space Administration's Michoud Assembly Facility (hereinafter NASA's Michoud Facility), which receive electrical utility services from NOPSI are located on the East Bank of the Mississippi River in the City of New Orleans. These federal agencies have no alternative source of electrical utility service.

8.

NOPSI is the sole company which has an indeterminate permit from the City Council of the City of New Orleans for the supply of natural gas utility services to consumers in the City of New Orleans.

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9.

NOPSI provides most of the natural gas utility services for consumers located in the City of New Orleans, including federal agencies. In those instances where companies in New Orleans receive natural gas from other sources, NOPSI has built and maintains the connecting natural gas transmission lines from the company to the Parish of Orleans boundary line, and has specifically agreed to the arrangement.

10.

The parent company of defendant NOPSI is Middle South Utilities, Inc. which owns all of NOPSI's stock.

11.

NOPSI is guaranteed a profit in the sale of electrical and natural gas utility services to consumers in the City of New Orleans by Section 2 of City Council Ordinance 7068.

12.

NOPSI earned a profit of more than 6 per cent on its investment in 1973, and since 1965, has earned a profit on its natural gas and electrical utility services sold to consumers in the City of New Orleans.

13.

The City Council of the City of New Orleans in 1973, granted NOPSI rate increases on its charges to consumers for electrical and natural gas utility services.

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14.

Facilities which are owned and maintained by NOPSI on federal property in the City of New Orleans include:

a. All of one unmanned electrical substation and part of another (the East and West Master Substations), located on Nasa's Michoud Assembly Facility Property. The East Master Substation was built before NASA acquired the Michoud property, and the West Master Substation was built after NASA acquired the property.

1. Each substation is in effect divided into two parts, one part containing electrical equipment owned and maintained by defendant NOPSI and one part containing electrical equipment owned and maintained by defendant NOPSI and one part containing electrical equipment owned and maintained by NASA.

2. NOPSI currently supplies electricity into the substations at 115,000 volts.

3. In addition to owning and maintaining circuit breakers in the substations, NOPSI also owns and maintains insulators and switches therein.

b. Electrical transformers or switching gear in federal agencies at the following locations:

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1. *Federal Office Building, 600 South Street;*
2. *United States Court of Appeals, 600 Camp Street;*
3. *United States Customs House, 423 Canal Street;*
4. *United States Corps of Engineers, Pry-tania and the River;*
5. *United States Public Service Hospital; and the*
6. *United States Veterans Hospital.*

15.

In the City of New Orleans the major federal users of electrical and/or natural gas utility service supplied by NOPSI from 1965 through 1973, and the annual dollar value of utility services received are as follows:

a. *NASA'S Michoud Facility*

1. Electricity: (a) 1965: \$880,138.00; (b) 1966: \$845,-527.12; (c) 1967: \$825,991.96; (d) 1968: \$816,374.99; (e) 1969: \$795,688.65; (f) 1970: \$692,840.72; (g) 1971: \$636,-243.37; (h) 1972: \$702,274.90; (i) 1973: \$896,267.64.

2. Natural gas: (a) 1965: \$289,127.17; (b) 1966: \$302,213.67; (c) 1967: \$307,093.96; (d) 1968: \$308,697.39; (e) 1969: \$321,355.50; (f) 1970: \$302,411.85; (g) 1971: \$341,-355.26; (h) 1972: \$382,741.01; (i) 1973: \$505,191.92.

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3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$1,401,459.56.

b. *United States Post Office, (main branch) 701 Loyola Ave.:*

1. Electricity: (a) 1965: \$197,602.68; (b) 1966: \$191,-737.29; (c) 1967: \$202,169.33; (d) 1968: \$204,528.64; (e) 1969: \$197,780.81; (f) 1970: \$196,387.17; (g) 1971: \$209,-160.43; (h) 1972: \$216,828.42; (i) 1973: \$299,307.70.

2. Natural Gas: (a) 1965: \$41,671.38; (b) 1966: \$41,-916.46; (c) 1967: \$41,658.35; (d) 1968: \$42,353.69; (e) 1969: \$38,061.27; (f) 1970: \$36,471.61; (g) 1971: \$42,209.10; (h) 1972: \$52,123.87; (i) 1973: \$71,345.03.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$370,652.73.

c. *United States Veterans Administration Hospital:*

1. Electricity: (a) 1965: \$55,463.11; (b) 1966: \$93,-329.57; (c) 1967: \$107,848.91; (d) 1968: \$102,466.90; (e) 1969: \$99,186.29; (f) 1970: \$95,555.71; (g) 1971: \$110,-609.19; (h) 1972: \$118,833.13; (i) 1973: \$155,927.07.

2. Natural Gas: (a) 1965: \$16,974.85; (b) 1966: \$19,-828.81; (c) 1967: \$18,151.98; (d) 1968: \$19,396.26; (e) 1969: \$19,047.86; (f) 1970: \$18,360.66; (g) 1971: \$20,805.99; (h) 1972: \$23,353.73; (i) 1973: \$31,990.41.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$187,917.48.

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d. *United States Department of Agriculture, Southern Research Laboratory:*

1. Electricity: (a) 1965: \$43,650.44; (b) 1966: \$46,-771.35; (c) 1967: \$49,124.77; (d) 1968: \$51,933.60; (e) 1969: \$60,315.28; (f) 1970: \$62,506.70; (g) 1971: \$60,193.33; (h) 1972: \$62,846.88; (i) 1973: \$85,807.81.

2. Natural Gas: (a) 1965: \$11,622.57; (b) 1966: \$11,-739.61; (c) 1967: \$12,116.24; (d) 1968: \$12,973.83; (e) 1969: \$15,203.53; (f) 1970: \$14,658.56; (g) 1971: \$15,905.10; (h) 1972: \$18,432.26; (i) 1973: \$26,390.75.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$112,198.56.

e. *United States Navy Port of Embarkation [Gulf Division, Naval Facilities Engineering]:*

1. Electricity: (a) 1965: \$62,894.09; (b) 1966: \$59,-643.60; (c) 1967: \$61,711.05; (d) 1968: \$64,644.84; (e) 1969: \$73,557.38; (f) 1970: \$74,954.55; (g) 1971: \$76,911.75; (h) 1972: \$79,514.56; (i) 1973: \$101,249.72.

2. Natural Gas: (a) 1965: \$4,825.62; (b) 1966: \$5,-459.97; (c) 1967: \$4,821.03; (d) 1968: \$6,624.24; (e) 1969: \$6,734.61; (f) 1970: \$7,012.38; (g) 1971: \$6,878.46; (h) 1972: \$8,082.15; (i) 1973: \$9,746.26.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$110,995.98.

f. *United States Public Service Hospital:*

1. Electricity: (a) 1965: \$39,132.26; (b) 1966: \$39,-187.01; (c) 1967: \$44,307.92; (d) 1968: \$47,208.31; (e) 1969: \$52,283.84; (f) 1970: \$56,145.44; (g) 1971: \$59,997.25; (h) 1972: \$62,863.41; (i) 1973: \$82,637.17.

2. Natural Gas: (a) 1965: \$15,366.58; (b) 1966: \$14,-192.59; (c) 1967: \$13,402.89; (d) 1968: \$15,222.85; (e) 1969: \$14,487.77; (f) 1970: \$13,668.62; (g) 1971: \$14,468.61; (h) 1972: \$16,275.77; (i) 1973: \$23,176.56.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$105,813.73.

g. *United States Customs House [General Services Administration]:*

1. Electricity: (a) 1965: \$50,885.82; (b) 1966: \$47,-101.86; (c) 1967: \$48,887.38; (d) 1968: \$49,729.82; (e) 1969: \$47,720.82; (f) 1970: \$47,987.86; (g) 1971: \$50,947.59; (h) 1972: \$52,628.21; (i) 1973: \$65,652.11.

2. Natural Gas: (a) 1965: \$4,028.74; (b) 1966: \$3,-232.53; (c) 1967: \$2,756.24; (d) 1968: \$3,588.58; (e) 1969: \$2,499.20; (f) 1970: \$2,513.77; (g) 1971: \$2,084.90; (h) 1972: \$2,448.07; (i) 1973: \$3,729.45.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$69,291.56.

h. *Federal Reserve Bank, 523 St. Charles Avenue:*

1. Electricity: (a) 1965: none; (b) 1966: \$17,483.92; (c) 1967: \$28,572.29; (d) 1968: \$29,367.12; (e) 1969: \$29,-

481.47; (f) 1970: \$29,663.20; (g) 1971: \$30,495.47; (h) 1972: \$32,437.30; (i) 1973: \$45,642.59.

2. Natural Gas: (a) 1965: none; (b) 1966: \$4,785.86; (c) 1967: \$7,038.86; (d) 1968: \$7,237.08; (e) 1969: \$7,329.72; (f) 1970: \$6,737.03; (g) 1971: \$8,158.78; (h) 1972: \$10,-655.87; (i) 1973: \$19,474.83.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$65,117.42.

i. *United States Engineers, Prytania or Millaudon and the River:*

1. Electricity: (a) 1965: \$25,836.49; (b) 1966: \$32,-663.05; (c) 1967: \$37,531.29; (d) 1968: \$38,552.85; (e) 1969: \$41,435.78; (f) 1970: \$42,794.62; (g) 1971: \$44,768.12; (h) 1972: \$46,280.24; (i) 1973: \$60,957.42.

2. Natural Gas: (a) 1965: \$1,820.23; (b) 1966: \$2,-160.09; (c) 1967: \$1,766.61; (d) 1968: \$2,142.37; (e) 1969: \$1,961.34; (f) 1970: \$1,986.07; (g) 1971: \$1,931.81; (h) 1972: \$2,371.15; (i) 1973: \$3,648.33.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$64,605.75.

j. *C. O. Naval Support Activity:*

1. Electricity: None is received from defendant NOPSI. The facility is located on the West Bank of the Mississippi River in the City of New Orleans.

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2. Natural Gas: (a) 1965: \$35,170.08; (b) 1966: \$35,-803.62; (c) 1967: \$32,947.95; (d) 1968: \$38,970.64; (e) 1969: \$39,181.67; (f) 1970: \$38,473.86; (g) 1971: \$37,056.48; (h) 1972: \$39,238.26; (i) 1973: \$54,765.61.

3. Total dollar value of natural gas received from NOPSI in 1973: \$54,765.61.

k. *United States Court of Appeals, 600 Camp Street [General Services Administration]:*

1. Electricity: Service begun in 1972. (a) 1972: \$11,161.56; (b) 1973: \$41,332.60.

2. Natural Gas: None was received in 1973.

3. Total dollar value of electricity received from NOPSI in 1973: \$41,332.60.

1. *United States Coast Guard Pontchartrain Barracks, Urquhart and Industrial Canal:*

1. Electricity: (a) 1965: \$3,333.91; (b) 1966: \$6,-792.33; (c) 1967: \$6,794.28; (d) 1968: \$6,809.86; (e) 1969: \$18,157.85; (f) 1970: \$21,271.19; (g) 1971: \$19,750.58; (h) 1972: \$19,567.36; (i) 1973: \$28,198.33.

2. Natural Gas: (a) 1965: \$1,697.96; (b) 1966: \$1,-542.62; (c) 1967: \$1,563.55; (d) 1968: \$1,807.25; (e) 1969: \$2,155.86; (f) 1970: \$3,623.24; (g) 1971: \$2,852.15; (h) 1972: \$3,270.83; (i) 1973: \$3,943.47.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$32,141.80.

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m. *Raymond Fleming Training Center (formerly Camp Leroy Johnson) [Director of Facilities Engineering]:*

1. Electricity: (a) 1965: none; (b) 1966: \$13,378.48; (c) 1967: \$14,326.49; (d) 1968: \$18,999.80; (e) 1969: \$11,-447.95; (f) 1970: \$11,285.68; (g) 1971: \$11,519.94; (h) 1972: \$12,214.13; (i) 1973: 16,524.89.

2. Natural Gas: (a) 1965: \$2,900.83; (b) 1966: \$2,-820.21; (c) 1967: \$2,226.67; (d) 1968: \$2,936.39; (3) 1969: \$2,876.83; (f) 1970: \$2,893.53; (g) 1971: \$1,839.90; (h) 1972: \$1,844.22; (i) 1973: \$2,958.51.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$19,483.40.

n. *United States Coast Guard, North Depot N. Robertson and Industrial Canal:*

1. Electricity: (a) 1965: \$3,353.73; (b) 1966: \$7,-697.81; (c) 1967: \$8,495.83; (d) 1968: \$9,295.80; (e) 1969: \$9,253.91; (f) 1970: \$11,314.36; (g) 1971: \$12,812.48; (h) 1972: \$14,642.35; (i) 1973: \$19,415.41.

2. Natural Gas: None is received.

3. Total dollar value of electricity received from NOPSI in 1973: \$19,415.41.

o. *NASA's Michoud Wet Storage Area:*

1. Electricity: (a) 1965: \$1,993.46; (b) 1966: \$4,-077.74; (c) 1967: \$5,495.04; (d) 1968: \$6,566.86; (e) 1969:

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\$6,694.79; (f) 1970: \$7,000.94; (g) 1971: \$6,555.63; (h) 1972: \$7,846.02; (i) 1973: \$9,993.00.

2. Natural Gas: None is received.

3. Total dollar value of electricity received from NOPSI in 1973: \$9,993.00.

p. *United States Attorney's Office, 500 St. Louis Street [General Services Administration]:*

1. Electricity: (a) 1965: none; (b) 1966: none; (c) 1967: \$3,741.38; (d) 1968: \$5,132.63; (e) 1969: \$5,146.77; (f) 1970: \$5,233.81; (g) 1971: \$5,598.96; (h) 1972: \$5,622.88; (i) 1973: \$7,179.84.

2. Natural Gas: (a) 1965: \$3,449.55; (b) 1966: \$3,038.21; (c) 1967: \$3,058.49; (d) 1968: \$3,678.84; (e) 1969: \$1,991.77; (f) 1970: \$1,694.29; (g) 1971: \$1,774.30; (h) 1972: \$1,621.36; (i) 1973: \$2,255.29.

3. Total dollar value of electricity and natural gas received from NOPSI in 1973: \$9,435.13.

q. *United States Army Engineer Corps. Urquhart and Industrial Canal:*

1. Electricity: (a) 1965: \$7,454.27; (b) 1966: \$6,972.33; (c) 1967: \$6,798.91; (d) 1968: \$6,657.55; (e) 1969: \$6,566.04; (f) 1970: \$6,743.02; (g) 1971: \$6,664.31; (h) 1972: \$6,860.37; (i) 1973: \$8,814.02.

2. Natural Gas: None is received.

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3. Total dollar value of electricity received from NOPSI in 1973: \$8,814.02.

16.

In 1973, the NOPSI supplied the federal agencies listed in paragraph 15 with electrical utility services whose total value was \$1,924,757.32.

17.

In 1973, the NOPSI supplied the federal agencies listed in paragraph 15 with gas utility service whose total value was \$758,616.42.

18.

In 1973, the NOPSI supplied the federal agencies listed in paragraph 15 with electrical and natural gas utility services whose total value was \$2,683,373.74.

19.

In addition to the federal agencies listed in paragraph 15, NOPSI also supplies other federal agency locations with electric and/or natural gas utility services. These locations include the:

a. *United States Coast Guard Housing Development* which NOPSI supplies with electrical utility service.

b. *United States Navy Housing Project* which NOPSI supplies with natural gas utility service.

c. *General Services Administration Motor Pool, Girod and Liberty Streets* which NOPSI supplies with electrical utility services.

d. *General Services Administration Parking Lot, St. Charles Street* which NOPSI supplies with electrical utility services.

e. *Federal Office Building, Chef Menteur Highway* which NOPSI supplies with electrical and natural gas utility services.

f. *United States Quarantine Property.*

g. *Federal Office Building, 600 South Street* which NOPSI supplies with electrical and natural gas utility services.

h. *United States Post Office Garage, 764 S. Liberty Street* which NOPSI supplies with electrical and natural gas utility services.

i. *Federal Aviation Facility, New Orleans Lakefront Airport*, which NOPSI supplies with electrical utility services.

j. The following branch offices of the United States Post Office are supplied by NOPSI with electrical and natural gas utility services:

(1) *United States Post Office Branch, 4317-21 Bienville Street.*

(2) *United States Post Office Branch, 3923 Carondelet Street.*

(3) *United States Post Office Branch, 2051 Caton Street.*

(4) *United States Post Office Branch, 13225 Chef Menteur Highway.*

(5) *United States Post Office Branch, 1111 Poland Avenue.*

(6) *United States Post Office Branch, 4730 Washington Avenue.*

(7) *United States Post Office, Carrollton Branch.*

Currently, and from 1965 through 1973, each of the following federal agencies has annually received more than \$10,000 in total electrical and/or natural gas utility services from NOPSI:

a. *NASA's Michoud Facility;*

b. *United States Post Office (main branch), 701 Loyola Avenue;*

c. *United States Veterans Administration Hospital;*

d. *United States Department of Agriculture, Southern Research Laboratory;*

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- e. United States Navy Port of Embarkation [Gulf Division, Naval Facilities Engineering]
- f. United States Public Service Hospital;
- g. United States Customs House [General Services Administration];
- h. United States Engineers. Prytania or Millaudon and the River; and
- i. C. O. Naval Support Activity.

21.

NOPSI currently supplies the following additional federal agencies with electrical and/or natural gas utility services whose total value exceeds \$10,000 per year:

- a. Federal Reserve Bank, 523 St. Charles Avenue;
- b. United States Court of Appeals, 600 Camp Street [General Services Administration];
- c. United States Coast Guard Pontchartrain Barracks, Urquhart and Industrial Canal;
- d. Raymond Fleming Training Center (formerly Camp Leroy Johnson) [Director of Facilities Engineering]; and

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- e. United States Coast Guard, North Depot, N. Robertson and Industrial Canal.

22.

Currently, and from 1965 through 1973, each of the following federal agencies has annually received more than \$50,000 in total electrical and/or natural gas utility services from defendant NOPSI:

- a. NASA's Michoud Facility;
- b. United States Post Office (main branch), 701 Loyola Avenue;
- c. United States Veterans Administration Hospital;
- d. United States Department of Agriculture, Southern Research Laboratory;
- e. United States Navy Port of Embarkation [Gulf Division Naval Facilities Engineering];
- f. United States Health Service Hospital; and
- g. United States Customs House [General Services Administration].

23.

NOPSI currently supplies the following additional federal agencies with electrical and/or natural gas

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utility services whose total value exceeds \$50,000 per year:

- a. Federal Reserve Bank, 523 St. Charles Ave.;
- b. United States Engineers, Prytania or Millaudon and the River; and
- c. C. O. Naval Support Activity.

24.

NOPSI, since 1965, has at all times had more than 50 employees.

25.

All of the federal agencies to which NOPSI supplies electrical and/or natural gas utility services are billed by NOPSI on a monthly basis for such services. NOPSI's bills for utility services set forth, *inter alia*, the amount of utility services provided by NOPSI to the federal agency and the specific date on which the bill should be paid.

26.

All of the federal agencies which receive electric and/or natural gas utility services from NOPSI pay for such services on a regular basis.

27.

Should a customer fail to pay for electrical and/or natural gas utility services received, NOPSI has the

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available recourse of taking the defaulting customer to court in order to collect for the value of the utility services provided by NOPSI.

28.

Every federal agency currently receiving electric and/or natural gas utility services from NOPSI is receiving such services because it has requested them from NOPSI.

29.

NOPSI currently supplies electrical and/or natural gas utility services to federal agencies pursuant to written agreements as follows:

a. *United States Veterans Administration Hospital*: NOPSI currently supplies the Veterans Administration Hospital with electrical and natural gas utility services pursuant to a formal written contract which was executed on December 14, 1950. Paragraph 10 of the contract contains a "Non-Discrimination Clause" which was required to be included in the contract by Presidential Executive Orders 8802, (6 F.R. 3109, 9001 (6 F.R. 6787, 9346 (8 F.R. 7183), and 9664 (10 F.R. 15301). The contract was most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans were applied to the contract by NOPSI and were accepted through payment by the Veterans Administration.¹

¹ The amount which the Veterans Administration had to pay NOPSI for electricity increased from \$118,883.13 in 1972 to \$155,927.07 in 1973, and the amount it had to pay for natural gas increased from \$23,353.73 in 1972 to \$31,990.41 in 1973.

b. *United States Public Service Hospital*: NOPSI currently supplies the United States Public Service Hospital with electricity and natural gas pursuant to formal written contracts which were executed in 1931 and 1936. The contracts were most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans were applied to the contracts by NOPSI and were accepted through payment by the Public Health Service Hospital.

c. *United States Coast Guard (Pontchartrain Barracks) Urquhart and Industrial Canal*: NOPSI currently supplies the United States Coast Guard (Pontchartrain Barracks with electricity and natural gas pursuant to a formal written contract which was executed on June 20, 1951. The contract contains a "nondiscrimination" clause required by Presidential Executive Orders 8802 (6 F.R. 3109); 9001 (6 F.R. 6787); 9346 (8 F.R. 7183); 9664 (10 F.R. 15301). Among the more recent modifications of the contract are:

1. A December 29, 1966 written agreement between NOPSI and the Coast Guard for the extension of utility service by NOPSI to the vicinity of St. Claude Avenue and the Industrial Canal.

2. A 1973 modification caused by the application by NOPSI to the contract of increased rates for its charges for electric and natural gas utility services which had been approved by the City Council of the City of New Orleans, and which were accepted through payment by the Coast Guard.

d. *Raymond Fleming Training Center (formerly Camp Leroy Johnson)*: NOPSI currently supplies the Raymond Fleming Training Center, (whose name was changed from Camp Leroy Johnson in 1964 to its present name) with electrical and natural gas utility services pursuant to formal written contracts which pre-date 1960. The contracts were most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied to the contracts by NOPSI and which were accepted through payment by the Raymond Fleming Training Center.

e. *C.O. Naval Support Activity*: NOPSI currently supplies the C.O. Naval Support Activity with natural gas pursuant to a formal written contract which was executed on August 6, 1952. Paragraph 10 of the contract contains a non-discrimination in employment clause which was required to be included in the contract by Presidential Executive Orders 8802 (6 F.R. 3109), 9001 (6 F.R. 6787), 9346 (8 F.R. 7183), 9664 (10 F.R. 15301) and 10201 (16 F.R. 1049). The contract was most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied by NOPSI to the contract and were accepted through payment by the United States Navy.

f. *United States Department of Agriculture, Southern Research Laboratory*: NOPSI currently supplies electricity and natural gas to the U.S. Department of Agriculture's Southern Research Laboratory pursuant to a written agreement entitled "Customer's

Application to New Orleans Public Service, Inc." which is the predecessor of a NOPSI form entitled "Customer's Application and Contract with New Orleans Public Service, Inc." The agreement was signed by a NOPSI representative and a representative of the Department of Agriculture prior to 1964.

NOPSI admits the following with regard to the form entitled "Customer's Application and Contract with New Orleans Public Service, Inc."

(1) That when a potential utilities service customer such as the Department of Agriculture signs the form entitled "Customer's Application and Contract with New Orleans Public Service, Inc.," the customer is signing a contract with defendant NOPSI for utility services;

(2) That NOPSI has been using a variation of the form for 20 to 40 years, and that such prior forms had the same intent and purpose as the "Customer's Application and Contract" form presently in use by NOPSI;

(3) That the Customer's Application and Contract form is prepared and published by NOPSI;

(4) That the contract form authorizes NOPSI to install, operate, and maintain meters on the customer's property and to have free access to such meters;

(5) That paragraphs 15 and 17 of the contract form, refer to the form as a "contract";

(6) That the contract form is signed by both the customer and a representative of defendant NOPSI; and

(7) That residential customers of NOPSI are not required to sign the contract form.

NOPSI's contract with the Department of Agriculture was most recently modified in 1973, when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and accepted through payment by the Department of Agriculture.

g. *United States Post Office Branch, 4317 Bienville Street:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by the Post Office.

h. *United States Post Office Branch, 3923 Carondelet Street:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.," which was signed by a NOPSI representative and a Post Office

representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the Contract and were accepted through payment by the Post Office.

i. *United States Post Office Branch, 2051 Caton Street:* Defendant NOPSI currently supplies electrical and natural gas utility service pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative prior to 1964. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied by NOPSI to the contract and accepted through payment by the Post Office.

j. *United States Post Office Branch, 13225 Chef Menteur Highway:* Defendant NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract, and were accepted through payment by the Post Office.

k. *United States Post Office Branch, 1111 Poland Avenue:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.," which was signed by a NOPSI representative and a Post Office representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility service, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by the Post Office.

l. *United States Post Office Branch, 4730 Washington Avenue:* NOPSI currently supplies electrical and natural gas utility services pursuant to a written contract entitled "Customer's Application and Contract with New Orleans Public Service, Inc.", which was signed by a NOPSI representative and a Post Office representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied by NOPSI to the contract and were accepted through payment by the Post Office.

m. *Federal Office Building, 600 South Street:* NOPSI currently supplies electrical and natural gas utility services pursuant to two, separate, one-page written contracts entitled "Request for Metered Service" which were each signed by a NOPSI representative and a GSA representative in 1961. The 1961 contracts replaced longer written contracts between GSA

and NOPSI which had been signed on July 1, 1950. NOPSI admits the following with regard to the one page GSA "Request for Metered Service" form:

1. That NOPSI representatives often refer to the form as a "short form contract".

2. That the short form contract originates as a Request for Metered Service which GSA sends to NOPSI. Upon receipt of the request, a NOPSI representative then signs the document on NOPSI's behalf in a space provided for that purpose on the contract form.

NOPSI's 1961 electrical and natural gas contracts with GSA were most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans were applied by NOPSI to the contracts and were accepted through payment by GSA.

In 1973, GSA sent NOPSI a new proposed written contract to replace the 1961 written utilities contract. The new proposed written contract contained an equal opportunity clause required by Executive Order 11246. In a letter dated April 2, 1973, NOPSI rejected the new proposed contract on the grounds, *inter alia*, that the equal opportunity clause in the contract was "unsatisfactory to NOPSI.

- n. *United States Court of Appeals, 600 Camp Street:* NOPSI currently supplies electrical and natural gas utility services to the Court of Appeals

Building pursuant to two, separate, one-page written contracts entitled "Request for Metered Service", which were signed by a NOPSI representative and a GSA representative in 1972.

The 1972 Contracts were most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contracts and were accepted through payment by GSA.

- o. *GSA Motor Pool, Girod and Liberty Streets:* NOPSI is currently supplying electrical and probably natural gas utility service pursuant to a one page written contract entitled "Request for Metered Service", which was signed by a NOPSI representative and a GSA representative in 1972, and which replaced an early 1960's contract when the Motor Pool was relocated by GSA. The contract was most recently modified in 1973 when revised rate scheduled for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

- p. *GSA Parking Lot, St. Charles Street:* NOPSI currently supplies electrical utility service pursuant to a one page written contract entitled "Request for Metered Service", which was signed by a NOPSI representative and a GSA representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved

by the City Council of the City of New Orleans, were applied by NOPSI to the contract and accepted through payment by GSA.

q. *Federal Office Building, Chef Menteur Highway*: NOPSI currently supplies electrical and natural gas utility services pursuant to a one page written contract entitled "Request for Metered Service", which was signed by a NOPSI representative and a GSA representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

r. *United States Quarantine Property*: One segment of the Quarantine property currently receives utility services from defendant NOPSI pursuant to a one page written contract entitled "Request for Metered Service", which was signed by a NOPSI representative and a GSA representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

s. *United States Attorney's Office, 500 St. Louis Street*: NOPSI currently supplies electrical and natural gas utility service pursuant to a one page written contract entitled "Request for Metered Service", which was signed by a NOPSI representative

and a GSA representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

t. *United States Customs House, 423 Canal Street*: NOPSI currently supplies electrical and natural gas utility services pursuant to a one page written contract entitled "Request for Metered Service", which was signed in August, 1961 by a NOPSI representative and a GSA representative. The current 1961 contract replaced a prior contract at the same location. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

In 1973, GSA sent NOPSI a new proposed written contract to replace the 1961 written utilities contract. The new proposed written contract contained an equal opportunity clause required by Executive Order 11246. In a letter dated April 2, 1973, NOPSI rejected the new proposed contract on the grounds, *inter alia*, that the equal opportunity clause in the contract was "unsatisfactory to NOPSI."

u. *Federal Aviation Facility, New Orleans Lakefront Airport*: NOPSI currently supplies electrical utility services pursuant to a one page written contract entitled "Request for Metered Service".

which was signed by a NOPSI representative and a GSA representative. The contract was most recently modified in 1973 when revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were applied by NOPSI to the contract and were accepted through payment by GSA.

v. *United States Navy Port of Embarkation:* Prior to 1966, the Port of Embarkation was under the jurisdiction of the United States Army. Thereafter, jurisdiction was transferred to the United States Navy.

NOPSI currently supplies electrical utility service to the Port of Embarkation pursuant to a June, 1937 formal written contract which was signed by representatives of both NOPSI and the United States Army. NOPSI currently provides natural gas utility service to the Port of Embarkation pursuant to a 1945 formal written contract which was also signed by representatives of both NOPSI and the United States Army. Paragraph 8 of the 1945 contract contains an "Anti-discrimination" clause which was required to be included in the contract by Presidential Executive Orders 8802 (6 F.R. 3109), 9001 (6 F.R. 6787), and 9346 (8 F.R. 7183). In June 1966, the Army sent NOPSI written notification informing it that the two contracts for the Port of Embarkation were being transferred to the United States Navy. Subsequently, NOPSI and Navy representatives signed written agreements which transferred the contracts to the Navy. Among the more recent modifications of the contracts are:

1. Two November 6, 1966 written agreements between NOPSI and the Navy under which revised rate schedules for NOPSI-supplied electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, were made applicable to the contracts by the parties.

2. 1973 modifications caused by the application by NOPSI to the contracts of increased rates for its charges for electrical and natural gas utility services, which had been approved by the City Council of the City of New Orleans, and which were accepted through payment by the Navy's Port of Embarkation.

NOPSI currently supplies electrical and/or natural gas utility services to the following federal agencies which are not in the form of formal written agreements signed by both defendant NOPSI and the federal agencies to whom NOPSI supplies utility services:

a. *NASA's Michoud Facility:*

(1) On September 1, 1965, NASA and NOPSI signed a formal written utilities service contract (effective July 1, 1965) for the provision by NOPSI of electricity and natural gas utility services at NASA's Michoud Facility. This formal written contract which was for a term of one year, was renewed on a yearly basis by NASA through the exercise of unilateral options in 1966, 1967, 1968 and 1969. The formal written contract was terminated by its own terms on June 30, 1970.

(2) Paragraph 7 of the 1965 NASA-NOPSI Michoud formal written utilities services contract, contained an equal opportunity clause mandated by Executive Order 10925 (the predecessor of Executive Order 11246) to be included in all nonexempt federal contracts. Paragraph 7 provided in pertinent part that:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. . . .

(d) The Contractor will comply with all provisions of Executive Order 10925 of March 6, 1961, as amended by Executive Order 11114 of June 22, 1963, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order 10925 of March 6, 1961, as amended by Executive Order 11114 of June 22, 1963, and by

the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(3) Paragraph 1 of the 1965 NASA-NOPSI Michoud formal written contract was entitled "Scope of Contract", and provided in pertinent part that:

The scope of this contract is limited to the Michoud Operations, wherein, subject to the terms and conditions hereinafter set forth, the Contractor agrees to purchase and receive from the contractor Natural Gas and Electric Power services requested by the Government from the Contractor at George C. Marshall Space Flight Center — Michoud Operations, . . . all in accordance with the Rate Schedules, . . . and the Service Specifications, . . . attached hereto. . . .

(4) Paragraph 15 of the 1965 NASA-NOPSI Michoud formal written contract which was entitled "Contractor's Facilities" provided in pertinent part that:

(a) The Contractor, at its expense, shall furnish, install, operate and maintain all facilities required to furnish electric and gas service to the points of delivery specified in the Service Specifications and all metering equipment required to measure such serv-

ice. . . . Title to all such facilities shall be and remain in the contractor. . . .

(b) The Government hereby grants to the Contractor, free of any rental or similar charge, . . . , a revocable permit or license to enter the service location for any purpose under this contract, including use of the site or sites agreed upon by the parties hereto for the installation, operation and maintenance of the facilities of the Contractor required to be located upon Government premises, all of which facilities shall be and remain the sole property of the Contractor and shall at all times during the life of this contract be operated and maintained by the Contractor at its expense; . . . Authorized representatives of the Contractor will be allowed access to the facilities. Such facilities shall be removed and Government premises restored to their original condition by the Contractor at its expense within a reasonable time after the Government shall revoke the permit or license herein granted and in any event within a reasonable time after termination of this contract; . . . The permit shall terminate at the expiration of the contract.

(5) The Deputy Chief, Office of Contract Compliance of the United States Department of Defense, sent NOPSI a letter dated June 4, 1969, which stated that NASA had requested the Department of Defense to conduct a compliance review of NOPSI in order to determine whether NOPSI was in compliance with Executive Order 11246. NOPSI replied via letter dated

June 18, 1969, and denied the Department of Defense access on the grounds that paragraph number 1 of the 1965 NASA-NOPSI formal written Michoud utilities contract limited the scope of the contract to NASA's Michoud Facility, and that Executive Order 11246 did not apply to NOPSI since NOPSI had no employees assigned at the Michoud Facility and none engaged in work solely to provide service therein.

NOPSI, in a letter dated June 20, 1969, was again informed by the Deputy Chief, Office of Contract Compliance of the United States Department of Defense, that it was subject to Executive Order 11246 unless it had received an exemption in writing.

NOPSI replied in a letter dated June 26, 1969, reasserting that paragraph 1 of the 1965 NASA-NOPSI formal written Michoud utilities contract exempted NOPSI from the coverage of Executive Order 11246.

By virtue of the June 4, 1969, and June 20, 1969 letters to NOPSI from the Department of Defense Supply Agency, NASA notified NOPSI that NASA considered the 1965 NASA-NOPSI formal written Michoud utilities contract to be covered by Executive Order 11246.

(6) Representatives of NOPSI, NASA, and GSA met in late 1969 and early 1970 to discuss the formulation of a new formal written electrical and natural gas utilities service contract for NASA's Michoud Facility to replace the 1965 NASA-NOPSI Michoud formal written contract which was due to expire by its own terms on June 30, 1970.

NASA representatives informed NOPSI that they had been directed not to enter any new formal written contracts which contained scope limitation language similar to that contained in paragraph 1 of the 1965 NASA-NOPSI Michoud formal written contract. After a series of discussions, an impasse was reached in which NASA would not agree to the scope limitation and NOPSI would not agree to the inclusion of Executive Order 11246's equal opportunity clause in the formal written contract unless NASA would agree to a scope limitation similar to that contained in the 1965 NASA-NOPSI Michoud formal written contract.

(7) The day after the 1965 NASA-NOPSI Michoud formal written contract was terminated by its own terms, NOPSI's Industrial Representative in charge of NOPSI's relations with federal agencies in New Orleans informed NASA officials via letter that because contract negotiations were still continuing between NASA and NOPSI, NOPSI would continue to provide NASA's Michoud Facility with electric and gas services as it had done in the past, subject to rate schedules set out in the letter. NOPSI also informed NASA officials that it intended to continue supplying utility services to NASA until further notice from NASA.

(8) Paragraph 15(b) of the 1965 NASA-NOPSI Michoud formal written contract concerned the removal of NOPSI-owned equipment from NASA's Michoud property after termination of their contract. However, NOPSI's equipment was not removed from NASA's Michoud Facility property after the termination date of the formal written contract, as required by their contract, because NASA officials expressly re-

quested that NOPSI continue supplying NASA's Michoud Facility with electrical and natural gas utility services.

(9) Since June 30, 1970, NOPSI has continued to provide NASA's Michoud Facility with electricity and natural gas utility services valued in excess of \$1,000,000 per year.

(10) The Senior Assistant Contract Compliance Officer of GSA's Region 7, informed NOPSI via letter dated March 5, 1971, that Federal Government records indicated that NOPSI was a Government contractor subject to Executive Orders 11246 and 11375 and the rules and regulations pertaining thereto, and that GSA had been assigned responsibility for determining the extent to which NOPSI was in compliance with Executive Order 11246.

NOPSI replied in a letter dated March 30, 1971, that NOPSI was not subject to Executive Orders 11246 and 11375 because NOPSI had "no currently effective government contracts in which we have agreed to be subject to the provisions of Presidential Executive Orders 11246 and 11375. . .".

(11) On February 24, 1972, NASA and GSA representatives met in New Orleans with NOPSI officials for the purpose of discussing NOPSI's new proposed rate structure and for the purpose of negotiating a formal written Michoud Facility utilities service contract between NASA and GSA with NOPSI.

At the meeting, the GSA representative stated on behalf of the United States that he had authority to negotiate changes in every provision of the proposed formal written utilities contract with the exception of the equal opportunity clause required by Executive Order 11246. NOPSI's representatives acknowledged that NOPSI was subject to the Civil Rights Act of 1964, but reasserted that it was not subject to, nor would it agree to the inclusion of Executive Order 11246's equal opportunity clause in the written contract unless NASA and GSA would agree to a scope limitation in the contract similar to that included in the 1965 NASA-NOPSI Michoud formal written contract. NOPSI's representatives further stated that there would not be a formal written contract between NASA and NOPSI as long as NASA insisted on including the equal opportunity clause in the contract without also including a scope limitation similar to that included in the 1965 NASA-NOPSI Michoud formal written contract.

(12) The court finds that a contract for the supply of electrical and natural gas utility service currently exists, and has existed, between NASA and defendant NOPSI.

a. *Federal Reserve Bank*: NOPSI currently supplies electrical and natural gas utility service pursuant to what was apparently an oral request for service which predates 1964. In 1964, when the location of the Bank was moved from Carondelet Street to St. Charles Street, no new agreement was executed between NOPSI and the Federal Reserve Bank.

The court finds that the oral agreement between NOPSI and the Federal Reserve Bank formed a contract between the parties.

b. *United States Army Corps of Engineers, Prytania or Millaudon and the River*: NOPSI currently supplies electrical and natural gas utility service pursuant to an agreement which dates back to the 1920's. NOPSI has no record in its files as to whether the agreement was ever reduced to writing.

The court finds the agreement between NOPSI and the Corps of Engineers formed a contract.

c. *United States Guard Housing Development*: NOPSI currently supplies electrical utility service pursuant to a 1971 letter request that it received from the Coast Guard's Contracting Officer.

The court finds this agreement between NOPSI and the Coast Guard to be a contract.

d. *United States Navy Housing Project*: NOPSI currently supplies natural gas utility services pursuant to a 1963 letter request from the Navy.

The court finds this agreement between NOPSI and the Navy is a contract.

e. *United States Post Office (main branch) 701 Loyola*: The Post Office's main branch is currently receiving electrical and natural gas utility service pursuant to a 1970 written contract entitled "Customer's Application and Contract with New

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Orleans Public Service, Inc., or in the alternative, pursuant to a letter from the Postmaster requesting utility services which replaced an earlier agreement.

The court finds that the agreement for utility services is a contract.

31.

The Director of the Office of Federal Contract Compliance has designated the General Services Administration as the federal agency responsible for determining whether utility companies in the New Orleans, Louisiana area, including defendant NOPSI, are in compliance with Executive Order 11246.

32.

By virtue of GSA's March 15, 1971 letter to NOPSI regarding NOPSI's coverage under Executive Orders 11246 and 11375, NOPSI received notice from GSA that Executive Order 11246's equal opportunity clause was considered by GSA to a part of all nonexempt NOPSI contracts with federal agencies, whether written or unwritten.

33.

NOPSI has since 1965, refused to comply with all provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto which are applicable to Government contractors.

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34.

NOPSI has never received a written exemption from the coverage of Executive Order 11246, as amended, or Executive Order 10925, as amended, from any federal compliance agency.

35.

NOPSI has never received notice of any kind from a federal compliance review agency that NOPSI is exempt from Executive Order 10925, as amended, or Executive Order 11246, as amended.

36.

The Director of the Office of Federal Contract Compliance (hereinafter OFCC), in a letter to NOPSI dated July 25, 1972, informed NOPSI of his determination, pursuant to the Secretary of Labor's regulations implementing Executive Order 11246, that NOPSI is a federal contractor subject to Executive Order 11246 and the implementing rules and regulations issued pursuant thereto even though there is at present no formal written agreement between NASA and NOPSI for the provision of electrical and natural gas utility services by NOPSI at NASA's Michoud Facility. The letter cited sections 202(5) and 206(a) of Executive Order 11246 and 41 CFR 60-1.3(m), 41 CFR 60-1.4(d), and 41 CFR 60-1.4(e) of the Secretary of Labor's rules and regulations implementing the Executive Order as grounds for his determination that NOPSI is a Government contractor. The Director of OFCC ordered NOPSI to comply with Executive Order 11246, or in the alternative, to face sanctions pursuant to sec-

tion 209(a) of Executive Order 11246, which could include referral of the matter to the Department of Justice for appropriate action.

37.

NOPSI on August 21, 1972, informed OFCC and GSA by letter that it was NOPSI's position that it was not supplying electricity and natural gas to NASA's Michoud Facility pursuant to any contract, either written or implied, but was instead supplying the utility services to NASA pursuant to indeterminate permits or franchises granted to NOPSI by its regulatory body, the City Council of New Orleans, which require NOPSI to provide services to all persons requesting them. The letter stated that since there was no contract between NASA and NOPSI, Executive Order 11246 and its implementing rules and regulations did not apply to NOPSI, and that therefore, there was no grounds for a compliance review by GSA.

CONCLUSIONS OF LAW

1.

This court has jurisdiction of this action under 28 U.S.C. §1345.

2.

The United States has standing to enforce its contractual rights in this court. *See, e.g., Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956). *See also United States v. Frazer*, 297 F.Supp. 319 (M.D. Ala. 1968).

3.

In addition, Section 209(a)(2) of Executive Order 11246 (30 F.R. 12319), as amended, authorizes the United States Department of Justice to obtain relief against substantial or material violation, or the threat thereof, on the part of the defendant to the rights to equal employment opportunity secured by Executive Order 11246, as amended.

4.

Executive Order 11246 has the force and effect of law. *United States v. Local 189, Papermakers*, 282 F.Supp. 39, 43 (E.D. La. 1968), *aff'd.*, 416 F.2d 980 (C.A. 5, 1969), *cert. denied*, 397 U.S. 919 (1970); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (C.A. 3, 1971), *cert. denied*, 404 U.S. 854 (1971); *Southern Illinois Builders Association v. Ogilvie*, 327 F.Supp. 1154, *aff'd.*, 471 F.2d 680 (7th Cir. 1972); *Joyce v. McCrane*, 320 F.Supp. 1284 (D.N.J. 1970). *See also Weiner v. Cuyahoga Community College District*, 238 N.E.2d 839 (Ohio Comm. Pleas. 1968), *aff'd.*, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964); *Farkas v. Texas Instrument Co.*, 375 F.2d 629 (5th Cir. 1967).

5.

Section 201 of Executive Order 11246 vests primary responsibility for administration of Part II of Executive Order 11246 which is entitled "Nondiscrimination in Employment by Government Contractors and Subcontractors" in the United States

Secretary of Labor (hereinafter the Secretary of Labor). Furthermore, Section 201 empowers the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purpose" of Executive Order 11246.

6.

Section 202 of Executive Order 11246 requires that specified equal opportunity language must be placed in each nonexempt Government contract and requires in pertinent part that:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship . . .

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of Sept. 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders . . .

7.

Regulations of federal agencies themselves have the force and effect of law unless they are in conflict with authorizing provision of federal law. See, e.g., *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1919); *Daeuffer-Liberman Brewing Co. v. United States*, 36 F.2d 568, 570 (3rd Cir. 1929); *Williams v. Commissioner of Internal Revenue*, 44 F.2d 467, 468-469 (8th Cir. 1930); *Ex parte Sackett*, 74 F.2d 922-923 (9th Cir. 1935); *G. L. Christian and Associates v. United States*, 312 F.2d 418, 424 (Ct. Cl. 1963), rehearing denied, 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963), rehearing denied, 376 U.S. 929 (1964); motion for leave to file second petition for rehearing denied, 377 U.S. 1010 (1964); *Barclay v. United States*, 333 F.2d 847, 856 (Ct. Cl., 1964); *Condec Corp. v. United States*, 369 F.2d 753, 757 (Ct. Cl. 1966); *United States v. Maryland Casualty Co.*, 215 F.Supp. 700, 701-702 (E.D. N.Y. 1963);

Ridgway Hatcheries, Inc. v. United States, 278 F.Supp. 441 (N.D. Ohio, 1968).

8.

The United States Secretary of Labor's regulations issued pursuant to the authority granted him by Section 201 of Executive Order 11246 have the force and effect of law if they are not in conflict with the Executive Order. See *Maryland Casualty Co. v. United States, supra*.

9.

In 41 C.F.R. 60-1.1, the Secretary of Labor provided that his regulations issued pursuant to Executive Order 11246 apply "to all contracting agencies of the Government and to contractors . . . who perform under Government contracts, to the extent set forth in this part . . ."

10.

In 41 C.F.R. 60-1.2, the Secretary of Labor delegated the authority and responsibility "for carrying out the responsibilities assigned to the Secretary" by Executive Order 11246 to the Director of OFCC.

11.

In 41 C.F.R. 60-1.3(f), the Secretary of Labor defined the term "contract" as meaning "any Government contract."

12.

In 41 C.F.R. 60-1.3(g), the Secretary of Labor defined the term "contracting agency" as "any department, agency, . . . in the Executive Branch of the Government."

13.

In 41 C.F.R. 60-1.3(i), the Secretary of Labor provided that the term "Director" means the Director of OFCC or "any person to whom he directs authority" under the regulations implementing Executive Order 11246.

14.

In 41 C.F.R. 60-1.3(m), the Secretary of Labor defined a Government contract" as:

any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services . . . The term 'services', as used in this definition includes, but is not limited to the following services: Utility . . .²

² In addition, both the Federal Procurement regulations and the Department of Defense Procurement regulations define a "Government contract" for equal employment opportunity purposes as "any agreement or modification thereof" for the furnishing of supplies or services. Both regulations specifically define "services" as including utility services [41 C.F.R. 1-12.802(m) and 32 C.F.R. 12.804(a)].

Federal Procurement regulations dealing with "Equal Opportunity in Employment" which are published at 41 C.F.R. 1-12.8 through 41 C.F.R. 1-12.814, were issued pursuant to authority granted by 40 U.S.C. §486(c), while Department of Defense Procurement regulations dealing with "Equal Employment Opportunity", which are published at 32 C.F.R. 12.800 through 32 C.F.R.

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15.

In 41 C.F.R. 60-1.4(a), the Secretary of Labor provided that language identical to that contained in Section 202 of Executive Order 11246 must be included in each nonexempt Government contract.

16.

In 41 C.F.R. 60-1.4(d), the Secretary of Labor provided that the Director of OFCC may incorporate the equal opportunity provision of Section 202 of Executive Order 11246 into any contract designated by the Director:

The equal opportunity clause may be incorporated by reference in Government bills of lading, transportation requests . . . contracts and subcontracts less than \$50,000 and such other contracts as the Director may designate.

17.

In 41 C.F.R. 60-1.4(e), the Secretary of Labor provided that the equal opportunity provision of Section 202 of Executive Order 11246 may be included in every

12.814, were issued pursuant to authority granted by 5 U.S.C. §301 and 10 U.S.C. §2202 and 2301-2314. Neither the Federal Procurement regulations dealing with Equal Opportunity in Employment nor the Department of Defense regulations dealing with "Equal Employment Opportunity" conflict with the provisions of their respective authorizing statutory provisions. Therefore, both the Federal Procurement regulations dealing with "Equal Opportunity in Employment" and the Department of Defense regulations dealing with "Equal Employment Opportunity" have the force and effect of law. *Maryland Casualty Co. v. United States*, *supra*.

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nonexempt contract even though there is no written contract between the agency and the contractor.

By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order to include such a clause whether or not it is physically incorporated in such contracts. The clause may also be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor.

18.

In 41 C.F.R. 60-1.5(a), the Secretary of Labor provided that contracts and subcontracts which do not exceed \$10,000 per year are exempt from the requirements of the equal opportunity clause.

19.

In 41 C.F.R. 60-1.5(b), the Secretary of Labor provided that contracts and subcontracts for indefinite quantities (including but not limited to open end, requirement type contracts) are subject to Executive Order 11246 if the amount to be ordered in any given year exceeds \$10,000.

20.

In 41 C.F.R. 60-1.45, the Secretary of Labor provided that contracts and subcontracts which were in effect prior to October 24, 1965 (the effective date of Executive Order 11246) and which are subsequently

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modified after October 24, 1965, are thereafter subject to Executive Order 11246.

21.

The Secretary of Labor's regulations issued pursuant to the authority granted him by Executive Order 11246 (which are published at 41 C.F.R. 60-1 & et seq.) do not conflict with the provisions of Executive Order 11246 and therefore have the force and effect of law. See, e.g., *Maryland Casualty Co. v. United States*, *supra*.

22.

Executive Order 11246's equal opportunity clause is required by Section 202 of Executive Order 11246 to be included in all nonexempt Government contracts. 41 C.F.R. 60-1.4(e) provides that the equal opportunity clause is "considered to be a part of" every contract which is required by Executive Order 11246 and the regulations issued pursuant thereto to include the clause "whether or not it is physically incorporated in such contracts." In addition, the Equal Employment Opportunity provisions of both the Federal Procurement Regulations and the Department of Defense Procurement regulations provide that Executive Order 11246's equal opportunity clause is considered to be a part of every Government contract which is required to contain the clause regardless of whether it is physically incorporated in the contract [41 C.F.R. 1-12.803-8 and 32 C.F.R. 12.804(d)]. Therefore, since the Secretary of Labor's regulations issued pursuant to Executive Order 11246 have the force and effect of law, every nonexempt NOPSI Government contract con-

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tains the equal opportunity clause even though the clause is not physically included in such contracts [41 C.F.R. 60-1.4(e)].

23.

Where a contract provision is required by statute or by lawful regulation to be included in the contract, the fact that the provision is not included in the contract, and has not even been agreed upon by the parties, does not exclude the contract from the provision's coverage. See, e.g., *G. L. Christian and Associates v. United States*, *supra*, 312 F.2d 418; *J. W. Bateson Co., Inc. v. United States*, 162 Ct. Cl. 566 (1963); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 at 1304 (D.C. Cir. 1971). See also *Russell Motor Car Co. v. United States*, 261 U.S. 514, 524 (1923); *College Point Boat Co. v. United States*, 267 U.S. 12, 14-16 (1925); *DeLaval Steam Turbine Co. v. United States*, 284 U.S. 61 (1931); *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 178 F.2d 854, 858 (9th Cir. 1949). Therefore, since every nonexempt Government contract is subject to Executive Order 11246 as a matter of law, the fact that defendant NOPSI has never agreed either orally or in writing to be subject to Executive Order 11246 and the rules and regulations issued pursuant thereto, does not remove NOPSI from the coverage of the Executive Order.

24.

The enforcing agency's administrative interpretation of a federal statute (or by analogy, its interpretation of an Executive Order which has been held by the

courts to have the force and effect of law) is entitled to great deference by the courts. Such administrative interpretation is presumed valid if consistent with the purposes of the statute or Executive Order. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965); *Power Reactor Co. v. Electricians*, 367 U.S. 396 (1961). See also *Local 189 United Papermakers v. United States*, 416 F.2d 980, 997 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

25.

Therefore, the Secretary of Labor's (or his authorized representative's administrative interpretation of Executive Order 11246, as amended, is entitled to great deference by the courts and is presumed valid if consistent with the purposes of Executive Order 11246. See, e.g., *Griggs v. Duke Power Co.*, supra.

26.

Executive Order 11246 and the rules and regulations issued pursuant thereto provide that any nonexempt Government contract is subject to Executive Order 11246. Thus, a contractor is subject to Executive Order 11246 and the rules and regulations issued pursuant thereto if he has one nonexempt Government contract.

27.

At the present time, defendant NOPSI has nine written Government contracts with federal agencies, each of whose value exceeds \$10,000 per year [i.e., (1) United States Veterans Administration Hospital; (2)

United States Public Service Hospital; (3) United States Coast Guard Pontchartrain Barracks; (4) Raymond Fleming Training Center; (5) C. O. Naval Support Activity; (6) United States Department of Agriculture, Southern Research Laboratory; (7) GSA for United States Customs House; (8) GSA for the United States Court of Appeals Building; and (9) United States Navy Port of Embarkation]. None of these contracts has received an exemption. Therefore, each such contract is subject to executive Order 11246 and the rules and regulations issued pursuant thereto. See, e.g., 41 C.F.R. 60-1.3(m), 41 C.F.R. 60-1.4(e); 41 C.F.R. 60-1.5; and 41 C.F.R. 60-1.45.

28.

Though not formalized by an agreement between the parties, contracts existed and still exist between NOPSI and the various governmental agencies. The court's conclusion is premised on the following reasons:

- a. The governmental agency involved requested that NOPSI provide the utility service.
- b. NOPSI agreed to provide the service, and has continued to supply utility services.
- c. The governmental agency involved pays NOPSI on a regular basis in consideration for the utility services received.

Furthermore, the value of each contract [i.e., (1) NASA's Michoud Facility; (2) Federal Reserve Bank;

(3) United States Army Corps of Engineers, Prytania or Millaudon and the River; and (4) United States Post Office (Main Branch)] exceeds \$10,000.00 per year. None of these contracts has received an exemption. Therefore, each such contract is subject to Executive Order 11246 and the rules and regulations issued pursuant thereto. See, e.g., 41 C.F.R. 60-1.3(m); 41 C.F.R. 60-1.4(d); 41 C.F.R. 60-1.4(e); 41 C.F.R. 60-1.5; 41 C.F.R. 60-1.45.

29.

The contracts for the (1) Veterans Administration Hospital; (2) Public Service Hospital; (3) Coast Guard; (4) Raymond Fleming Training Center; (5) C. O. Naval Support Activity; (6) U.S. Department of Agriculture; (7) U.S. Customs House; and (8) Navy Port of Embarkation each make defendant NOPSI a Government contractor subject to Executive Order 11246 because each of these contracts (all of which predate October 24, 1965), was modified after October 24, 1965, and thus is subject to Executive Order 11246 pursuant to 41 C.F.R. 60-1.45.

NOPSI's contract with GSA for the United States Court of Appeals Building was executed in 1972 and has therefore, since its inception, been subject to Executive Order 11246, thus making defendant NOPSI a Government contractor, even though Executive Order 11246's equal opportunity clause is not physically incorporated in the written contract.

30.

In addition to the above contracts which make defendant NOPSI a Government contractor subject to Ex-

ecutive Order 11246, NOPSI's contract with NASA referred to in Conclusion of Law 28, also makes NOPSI a Government contractor subject to Executive Order 11246 for the following reasons:

a. The Secretary of Labor's regulations issued pursuant to Executive Order 11246, which have the force and effect of law, expressly provide that:

(1) "Any agreement or modification thereof" for the supply of utility services between a Government agency and "any person" is a Government contract, 41 C.F.R. 60-1.3(m);

(2) The equal opportunity clause of Executive Order 11246 may be incorporated by reference into any contract designated by the Director of OFCC, 41 C.F.R. 60-1.4(d); and

(3) The equal opportunity clause is considered to be a part of every contract required by Executive Order 11246 to include it (i.e., every nonexempt contract), and the equal opportunity clause may be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor, 41 C.F.R. 60-1.4(e).

b. On March 15, 1971, GSA sent NOPSI a letter which had the effect of notifying NOPSI

that all of its nonexempt contracts with federal agencies, whether written or unwritten, were considered by GSA to be subject to Executive Order 11246, as amended [i.e., that Section 202 of Executive Order 11246's Equal Opportunity Clause was incorporated into each such contract]. This administrative interpretation is consistent with the purposes of Executive Order 11246 and therefore is entitled to great deference by the courts. *See, e.g., Griggs v. Duke Power, supra.*

c. In a letter dated July 5, 1972, the Director of OFCC informed defendant NOPSI that it is a Government contractor subject to Executive Order 11246 by virtue of the fact that the equal employment clause of Executive Order 11246 is mandatory and becomes "an indispensable part of the contractual agreement by reference and operation of the Order, whether the contract is written or unwritten between a governmental agency and contractor not specifically exempt . . ." The Director also informed NOPSI that Executive Order 11246 applies to "any agreement" for the supply of utility services, and he noted that NOPSI annually supplied NASA with more than \$1,000,000 worth of utility services. This administrative interpretation is consistent with the purposes of Executive Order 11246, and therefore is entitled to great deference by the Courts. *See, e.g., Griggs v. Duke Power Co., supra.*

d. The fact that defendant NOPSI has not agreed to be covered by Executive Order 11246 does not remove it from the coverage of the Executive Order. *See, e.g., G. L. Christian and Associates v. United States, supra.*

31.

In addition to NOPSI's Michoud contract, the other three unwritten contracts listed in Conclusion of Law No. 28, *supra*, each also makes defendant NOPSI a Government contractor subject to Executive Order 11246 for the reasons set forth in subparagraphs a-b and d of Conclusion of Law No. 30 above.

32.

Therefore, defendant NOPSI is a Government contractor subject to Executive Order 11246, as amended.

33.

Defendant NOPSI has violated Executive Order 11246, as amended by refusing to comply with Executive Order 11246 and the rules and regulations issued pursuant thereto.

34.

Where violations of Executive Order 11246, as amended, have occurred, proper relief includes the enjoining of future violations of the Executive Order [Section 209(a)(2) of Executive Order 11246], as well as correcting, insofar as feasible, the effects of past discrimination. *See, e.g., United States v. Louisiana, 380*

U.S. 145 (1965); *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969, cert. denied, 397 U.S. 919 (1970)); *Johnson v. Goodyear Tire and Rubber*, 491 F.2d 1364 (5th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

35.

Since the issue of coverage has been severed from the issue of substantive compliance, the court will not at this time issue an order as to what substantive relief should be granted in this case. Rather, the court will declare NOPSI to be a Government contractor subject to the requirements of Executive Order 11246, as amended, and will enjoin NOPSI from failing and refusing to comply with Executive Order 11246, as amended, and the rules and regulations issued pursuant thereto. The court will retain jurisdiction but will defer ruling on the issues of substantive relief until further proceedings are held. In that regard, the parties are hereby authorized to begin discovery on the issue of defendant NOPSI's substantive compliance with Executive Order 11246, as amended, and there rules and regulations issued pursuant thereto.

Let the Clerk prepare judgment accordingly.

/s/ FRED J. CASSIBRY
UNITED STATES DISTRICT
JUDGE

New Orleans, Louisiana
November 13, 1974.

GENERAL INJUNCTIVE ORDER

(Number and Title Omitted)

This Court having entered its Findings of Facts and Conclusions of Law in this action, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

A. The defendant New Orleans Public Service, Inc. (hereinafter NOPSI), its officers, agents, employees, successors, and all persons in active concert or participation with it are permanently enjoined and restrained at its New Orleans, Louisiana, facilities from:

1. Failing or refusing to comply with Executive Order 11246, as amended, and its successors (hereinafter Executive Order 11246) and the implementing regulations issued pursuant thereto so long as defendant is not exempt from the coverage of Executive Order 11246 by order of the United States Secretary of Labor or his representative or successor and so long as defendant continues to supply any federal agency in New Orleans, Louisiana with electrical and/or natural gas utility services valued in excess of \$10,000 per year;

2. Refusing to allow the General Services Administration or its successor compliance review agencies access, upon reasonable notice, to conduct compliance reviews which may include: (a) entry upon NOPSI property for the examination of NOPSI's facilities, and (b) examination and copying of NOPSI's books, records, accounts, and other relevant material for the purpose of ascertaining NOPSI's compliance

with Executive Order 11246 from October 24, 1965, the effective date of Executive Order 11246.

B. The parties are hereby authorized to begin discovery regarding defendant NOPSI's substantive compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto.

C. The United States shall recover from defendant NOPSI its taxable costs in this matter. However, determination of the amount of such costs shall be held in abeyance until after the Court rules regarding NOPSI's substantive compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto.

D. The Court hereby retains jurisdiction of this action for entry of all orders, judgments, or decrees which may be necessary to effectuate full and complete compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto, and also for a trial regarding NOPSI's substantive compliance with Executive Order 11246 in the event that a trial is found to be necessary.

ORDERED this the 13th day of November, 1974.

/s/ FRED J. CASSIBRY
United States District Judge

APPENDIX B

United States Court of Appeals
Fifth Circuit

No. 75-1130

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

NEW ORLEANS PUBLIC SERVICE INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

Michael J. Molony, Jr., New Orleans, La., for
defendant-appellant.

Gerald J. Gallinghouse, U. S. Atty., New Orleans,
La., David L. Rose, Chief, Employ. Div., Civ. Rights
Div. Dept. of Justice, Louis G. Ferrand, Jr., Naomi F.
White, Attys., Washington, D. C., for plaintiff-
appellee.

Michael Farrell, E. Grady Jolly, Jackson, Miss., for
amicus curiae.

Before AINSWORTH and CLARK, Circuit Judges,
and HUGHES,* District Judge.

* Senior District Judge of the Northern District of Texas sitting
by designation.

AINSWORTH, Circuit Judge:

Appellant, New Orleans Public Service, Inc. (hereinafter NOPSI), appeals from an adverse decision of the district court holding that NOPSI is a government contractor subject to Executive Order 11246¹, and permanently enjoining NOPSI from failing and refusing to comply with the Order, as amended, and the implementing rules and regulations. Questions as to the force, coverage and enforcement of the Executive Order are involved. The principal issue today before us is whether a public utility which, under a city permit, enjoys a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas and which sells such energy to the Government in substantial amount can be required by the Government to comply with the equal opportunity obligations of Executive Order 11246, even though the utility has not agreed to be so bound. We hold that the Government can compel such a utility to follow the Order; however, we disagree with the district court as to the appropriate remedy.

Executive Order 11246 prohibits employment discrimination by government contractors. The Order was issued by President Johnson in 1965, and requires that all covered government contracts contain a non-discrimination clause, including an agreement to take affirmative action to achieve the equal opportunity goals of the Executive Order's mandate. *Id.* § 202.

¹ 30 Fed.Reg. 12319 (1965), 3 C.F.R. 339 (1964-1965 Compilation), as amended by Exec. Order No. 11375, 32 Fed.Reg. 14303 (1967), 3 C.F.R. 406 (1969), 42 U.S.C.A. § 2000e note (1974), superseded in part (irrelevant for purposes herein) by Exec. Order No. 11478, 34 Fed.Reg. 12985 (1969), 3 C.F.R. 133 (1969 Compilation), 42 U.S.C.A. § 2000e note (1974).

NOPSI is a public utility which produces, distributes and sells electric power to consumers located in that part of New Orleans, Louisiana, on the east bank of the Mississippi River, and sells and distributes natural gas to consumers throughout the city. The company sells its gas and electricity pursuant to indeterminate permits,² like franchises, issued by the City Council of New Orleans. NOPSI is the only company with indeterminate permits to supply New Orleans with gas, and the east bank of the city with electricity. If any New Orleans consumer (including the Federal Government) on the east bank wishes to buy electric service, the consumer must purchase from NOPSI. NOPSI also provides most of the natural gas service to consumers (including the Federal Government) throughout the city, and in those cases where companies receive their gas from other sources, NOPSI has agreed to the arrangement and has built and maintained the transmission line connecting the company with the parish boundary. The federal agencies which buy electricity from NOPSI are on the east bank, and have no alternative source of electric power. NOPSI is regulated by the City Council, which in 1973 granted the company rate increases for its electric and natural gas services to customers.

A number of federal agencies and installations in New Orleans are major purchasers of electricity and natural gas from NOPSI. In 1973 NOPSI supplied such federal users with nearly \$2 million worth of electricity utility service, and with more than \$2,680,000 worth

² Under an indeterminate permit, the company is granted the right to supply such services indefinitely, but the grantor City Council retains the right to buy the utility operation from the company, thus terminating the permit.

of electric and natural gas utility services combined. There are nine federal agencies which at the present time and during the period 1965-1973 each have received over \$10,000 annually in combined gas and electric services from NOPSI; some of those each have received more than \$50,000 in such utility services annually. The biggest user, the Michoud Assembly Facility (hereinafter Michoud) of the National Aeronautics and Space Administration (hereinafter NASA), alone received approximately \$1.4 million worth of electricity and natural gas in 1973. The agencies are billed monthly and pay for the services on a regular basis.

According to the district court opinion, NOPSI supplies the Government with utility services pursuant to various contractual arrangements. The court found that NOPSI is supplying 22 federal agencies under written agreements. Some of those contracts predated the Executive Order, but the court found that they were modified by, *inter alia*, the 1973 revised rate schedules which were approved by the City Council; were applied to the particular contract by NOPSI; and were accepted, through payment, by the agency. A few of those contracts contained nondiscrimination clauses required by earlier Executive Orders. In the case of two agencies in the group, the Government had sent NOPSI a proposed new contract, containing the nondiscrimination clause required by Executive Order 11246, but NOPSI rejected the proposed contract on the ground that the clause was unsatisfactory. Other contracts were signed in 1972 or on dates not specified by the district court opinion and were modified by the revised rate schedules in 1973.

In addition, the district court found that NOPSI is supplying six other federal agencies pursuant to con-

tracts which were not formal, written agreements. Some of those contracts, for example, were based on letter requests from the federal agencies; another was based on an oral agreement.

Somewhat more complicated is the relationship between NOPSI and NASA's Michoud facility. Disagreement in that relationship precipitated the instant litigation. NOPSI supplied Michoud with electricity and natural gas under a written contract between the utility and the space agency which was signed in 1965 and terminated according to its own terms in June 1970. That contract contained an equal opportunity clause which was required by Executive Order 10925, the predecessor of Executive Order 11246. The contract also contained a limitation clause restricting the scope of the contract to the Michoud operations. Because of the NASA-NOPSI relationship involving utilities service at Michoud, the Government has tried in the past to review NOPSI's compliance with Executive Order 11246, but NOPSI has resisted on the ground that it was not covered by the Order. Attempts between the Government and NOPSI to negotiate a new utilities contract for Michoud broke down, with the Government unwilling to agree to a scope limitation like that in the 1965 contract, and NOPSI unwilling to agree to an equal opportunity clause without such a limitation. Nevertheless, NASA asked NOPSI to continue supplying Michoud, and NOPSI has continued to do so even though the formal contract has expired, subject to the rate schedules set out by NOPSI at the time of the termination of the written contract. The district court, after surveying

the preceding facts, held that a contract existed between NASA and NOPSI.³

The Government's efforts to conduct a compliance review of NOPSI began in 1969, and further unsuccessful attempts were made through 1972. This action was initiated by the Government through the Justice Department in 1973 to compel NOPSI's compliance with the Executive Order. After holding that NOPSI was covered by the Order, the district court permanently enjoined the utility from failing or refusing to comply with the Order and implementing regulations. The injunction reached NOPSI's refusal to allow the Government to conduct compliance reviews of NOPSI, and authorized the parties to begin discovery. In addition, the court retained continuing jurisdiction to effectuate NOPSI's full compliance with the Executive Order.

I. The Validity and Applicability of the Executive Order

A. The Executive Order Program

The Executive Order requires that every non-exempt government contract contain a clause under which the employer agrees not to discriminate in employment on the basis of race, color, religion, sex or national origin, and further agrees to take affirma-

³ The facts indicating the circumstances under which NOPSI supplied energy to the various government agencies are laid out fully in the district court's opinion, and are incorporated herein except insofar as they indicate specific contractual arrangements between NOPSI and the Government. The long-standing seller-purchaser relationship indisputably makes NOPSI a government contractor, and further contractual underpinning is unnecessary for our holding.

tive action to achieve the equal opportunity objective. Exec. Order No. 11246, § 202(1). The Secretary of Labor is responsible for the administration of the federal contract compliance program, and is empowered to issue rules and regulations to implement the Order. *Id.* § 201. In addition to the nondiscrimination clause, the required contract provision stipulates that the contractor will comply with all provisions of the Order and the implementing rules and regulations, *id.* § 202(4), that he will furnish all the information and reports⁴ required by the Order and the regulations and that he will permit access to his books and records by the contracting agency and the Secretary of Labor in order that they may determine his compliance. *Id.* § 202(5).

The Secretary of Labor is given various powers under sections 205 to 208 to carry out his mandate, including the authority to investigate the employment practices of government contractors. *Id.* § 206. Elsewhere the Order sets out various sanctions and penalties, one of which is that the Secretary of Labor may recommend to the Justice Department that it enforce by appropriate proceedings, including suits for injunctive relief, the provisions of the required nondiscrimination clause. *Id.* § 209(a)(2). Before such proceedings are initiated, though, the Order directs that "[u]nder rules and regulations prescribed by the Secretary of Labor," the contracting agency shall make reasonable efforts to achieve compliance by "conference, conciliation, mediation, and persuasion." *Id.* § 209(b).

⁴ Section 203 of the Order requires the filing of compliance reports by the contractor.

For purposes of the instant case, the critical — and disputed — provision of the federal contract compliance program is found in the Secretary of Labor's regulations, 41 C.F.R. § 60-1, as amended by 42 Fed. Reg. 3454, *et seq.* (1977), and states:

(e) *Incorporation by operation of the Order.* — By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

§ 60-1.4(e).⁵ Cf. *Id.* § 60-1.4(d) (incorporation by reference). The "equal opportunity clause" referred to in the regulation is the nondiscrimination clause set forth in the Executive Order. "Contract" means any "government contract," and "government contract" is defined to include "any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services." *Id.* § 60-

⁵ We note that, although certain changes in the regulations have occurred as a result of the 1977 amendments, the result we reach today would be the same whether or not the new regulations were in effect. Furthermore, we would apply the current version of the regulations in any event, since this appeal involves both a program requiring present compliance by NOPSI and a continuing injunctive order of the district court.

The language of the provision cited in the accompanying text reflects a minor change. The Labor Department's comments state:

The effect of the change in § 60-1.4(e) is to make it clear that, consistent with the intent of the Secretary and with existing case law, the equal opportunity clause is considered a part of all nonexempt contracts, including unwritten contracts. . . .

42 Fed. Reg. 3454 (1977).

1.3. The term "services," as used in the regulation, includes utility services. *Id.* Executive Order 11246 states in section 202 that the Order applies to every government contract entered into after the effective date unless the contract is specifically exempted under section 204. No such exemption is applicable in the instant case.⁶ Therefore, assuming no problems concerning the Order's basic validity or its application herein, NOPSI is clearly subject to the requirements of the program.

B. NOPSI's Argument

NOPSI argues that the Executive Order and the regulations do not give the Labor Department's Office of Federal Contract Compliance — the agency which administers the Executive Order — authority to compel the company to fulfill the affirmative action obligations of the program. In support of its position, NOPSI offers three arguments which speak to the

⁶ Section 204 of the Order provides that the Secretary of Labor may grant an exemption to a specific contract because of "special circumstances," or may exempt

facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order. . . .

No such exemption has been granted to NOPSI. Section 204(3) also provides for a class exemption, by rule or regulation, for contracts involving less than specified amounts of money. A contract which exceeds \$10,000 (or a contract of a government contractor having an aggregate total of government contracts within a twelve-month period in excess of \$10,000) is not exempt under section 204(3) from the requirements of the nondiscrimination clause. 41 C.F.R. 60-1.5, 42 Fed. Reg. 3454, 3459 (1977). Therefore, NOPSI is a nonexempt contractor. The effective date of the Order causes no problem since the case involves a contractual relationship which, in particular instances, has been renewed or modified by the parties since such effective date. See discussion *infra*.

validity of the regulations as herein applied, from the point of view of both executive power and general contract law.

First, NOPSI points out that it did not seek the Government's business or any government contracts. NOPSI contends that the relevant judicial decisions on the Executive Order all involved employers that sought the Government's business, *e.g.*, by bidding for government contracts, or were unquestionably government contractors, and that each case therefore presented an element of consent which is here lacking. Second, the company argues that it has consistently refused to accept the Order's affirmative action obligation. This argument, related to the first, assumes the necessity of NOPSI's consent in order for the company to be bound by the nondiscrimination clause. Third, NOPSI contends that it is not furnishing energy to the Government pursuant to any contract, but instead is supplying such energy pursuant to its franchises, granted by the City, which require NOPSI to provide power to all consumers who request it. Under that argument, NOPSI's status as a City franchisee precludes its having the status of a Federal Government contractor, given the fact that NOPSI has refused to accede to the contract terms required by the Government. Accordingly, NOPSI and amicus Mississippi Power & Light Company, appellant in No. 75-2590, 5 Cir., 1977, 553 F.2d 480, the companion case which we also decide today, challenge the application of the Executive Order both on the ground that it conflicts with the contractual principle of consent, and that it is action taken without authority from Congress.

C. The Program's Force and Effect

The starting point of our analysis is the well-established proposition that the Order has the force and effect of law. *Southern Ill. Builders Ass'n v. Ogilvie*, S.D.Ill., 1971, 327 F.Supp. 1154, *aff'd*, 471 F.2d 680 (7 Cir., 1972); *Joyce v. McCrane*, D.N.J., 1970, 320 F.Supp. 1284; *U. S. v. Local 189, United Papermakers & Paperworkers*, E.D. La., 1968, 282 F.Supp. 39; *see Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 3 Cir., 1971, 442 F.2d 159, *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95. *Cf. Farkas v. Texas Instrument, Inc.*, 5 Cir., 1967, 375 F.2d 629, *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (involved predecessor order, No. 10925); *Farmer v. Philadelphia Elec. Co.*, 3 Cir., 1964, 329 F.2d 3 (involved No. 10925 and prior orders). From that proposition flows our ultimate conclusion as to the validity of applying the Order to NOPSI in the instant case.

This circuit has held that Executive Order 10925, the predecessor of No. 11246, was issued pursuant to statutory authority because of the relationship between the anti-discrimination provision in the Order and the purposes of 40 U.S.C. § 486(a), the statute governing, *inter alia*, government procurement. *Farkas, supra*, 375 F.2d at 632 n. 1. More recently, the Third Circuit concluded that that statute supplied the express or implied authorization of Congress for the Executive Order today before us, as applied to government procurement. *Contractors Ass'n, supra*, 442 F.2d at 170.

Additional indicia of congressional support for the Labor Department's Executive Order program are dis-

cussed below, and furnish legal underpinning not only for the Executive Order, but for the regulation in dispute, 41 C.F.R. § 60-1.4(e), 42 Fed. Reg. 3454, 3459 (1977), as well. That is because an Executive Department regulation which is issued pursuant to an act of Congress and by the department responsible for the administration of the statute has the force and effect of law if it is not in conflict with an express statutory provision. *Maryland Cas. Co. v. United States*, 251 U.S. 342, 349, 40 S.Ct. 155, 157-58, 64 L.Ed. 297 (1920); *See G. L. Christian & Assoc. v. United States*, 1963, 312 F.2d 418, 424, 160 Ct.Cl. 1, cert. denied, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314. We perceive no such conflict in the instant case.

Furthermore, the appropriate measure of the regulation's validity is whether it was within the scope of the Executive Order. *See Contractors Ass'n, supra*, 442 F.2d at 175. In deciding that question, we give special deference to the Labor Department's interpretation of the Order which that department was charged to administer. *Id.*; *see Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971); *Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961). The Executive Order specifically authorized the issuance of implementing regulations by the Secretary of Labor, and the disputed provision, 41 C.F.R. § 60-1.4(e), did nothing more than give teeth to the mandate of the Order. The regulation was thus within the scope of the presidential directive in so implementing it. Under the preceding principles of strong deference to administrative interpretation, we

also find that the Department acted within the scope of the Order in applying the Order to NOPSI.

D. Executive and Legislative Action

As indicated earlier, the first strand of NOPSI's argument — namely, the contention that the Government acted without authority in this case — has to do with executive power. Yet that contention ignores the fact of a long-entrenched government program, set in motion and continually kept alive by a series of presidents and approved by Congress. The Executive Order program prohibiting employment discrimination by government contractors has been in effect since World War II. President Franklin D. Roosevelt issued the first such Executive Order, and each of his successors has followed suit. *See Contractors Ass'n, supra*, 442 F.2d at 168-71.

Roosevelt's initial prohibition, Executive Order 8802, 3 C.F.R. 957 (1938-1943 Compilation), required a nondiscrimination clause in all defense contracts. Pursuant to a subsequent statute intended to expedite the war effort, Roosevelt issued Executive Order 9001, 3 C.F.R. 1054 (Compilation 1938-1943), which stated that a nondiscrimination clause would be deemed incorporated by reference in all defense contracts covered by the statute. Executive Order 9346, 3 C.F.R. 1280 (1938-1943 Compilation), issued in 1943, required the inclusion of a nondiscrimination clause in all government contracts, not just in defense contracts. However, that Order was still based upon the President's war mobilization powers. *Contractors Ass'n, supra*, 442 F.2d at 169. Executive Orders 8002 and 9346 were continued by President Truman in 1945. Exec.

Order No. 9664, 3 C.F.R. 480 (1943-1948 Compilation). Six years later, the President signed an order continuing the provision that a nondiscrimination clause would be deemed incorporated by reference in all defense contracts, Exec. Order No. 10210, 3 C.F.R. 390 (1949-1953 Compilation), and the President, still acting under his war powers, issued another series of Executive Orders extending Executive Order 10210 to additional government agencies, other than the Department of Defense, engaged in defense-related procurement. *Contractors Ass'n, supra*, 442 F.2d at 169. President Eisenhower issued Executive Orders which broadened the contract compliance program, and, significantly, those orders were not issued pursuant to the President's power over defense production. *Id.* at 170. In 1961, President Kennedy issued Executive Order 10925, 3 C.F.R. 448 (1959-1963 Compilation), inserting "affirmative action" language in a nondiscrimination clause required in all government contracts. And President Johnson in 1965 issued Executive Order 11246, transferring to the Secretary of Labor certain compliance functions previously vested in the President's Committee on Equal Employment Opportunity, and continuing the affirmative action requirement.

Although the Labor Department's federal contract compliance program originated by Executive Order, rather than by legislation, Congress has considered the program on several occasions. At the least, there has been implied congressional approval of the program; it can even be argued that there has been express ratification. The Government correctly identifies three sources of legislative authorization for the Executive Order.

First, the President has express authority over direct federal procurement practices, under 40 U.S.C. § 486(a).⁷ While some presidents acted pursuant to their war powers in promulgating Executive Orders concerning employment discrimination by government contractors, the President's broad statutory procurement power has been held to be authorization for other Executive Orders which were not related to war production. See *Contractors Ass'n, supra*, 442 F.2d at 169-71; *Farkas, supra*, 375 F.2d at 632 n.1. Furthermore, more recent decisions involving Executive Order 11246 have candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and economic objectives. See *Rossetti Contracting Co. v. Brennan*, 7 Cir., 1975, 508 F.2d 1039, 1045 n.18; *Northeast Const. Co. v. Romney*, 1973, 157 U.S.App.D.C. 381, 485 F.2d 752, 760. Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order.

The second source of legislative authorization is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A reference in the Act, as originally enacted, *id.*

⁷ That provision authorizes the President to prescribe policies and directives to implement the Federal Property and Administrative Services Act of 1949, which deals with the management (including the procurement) and disposal of government property. *Mississippi Power & Light* argues that, assuming *arguendo* the validity of the Executive Order with respect to the procurement statute, the Order is nonetheless invalid under the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.*, for lack of both publication of the Order and notice of a hearing. *Mississippi Power & Light* apparently relies on 5 U.S.C. § 553. However, as the Government points out, rules relating to public contracts are expressly excepted from the requirements of that provision. *Id.* § 553(a)(2).

§ 2000e-8(d), to the Executive Order program indicated congressional intent that the program would continue in existence. See *Contractors Ass'n, supra*, 442 F.2d at 171. This reading of congressional intent is further supported by the decision of Congress at that time not to make Title VII the exclusive federal remedy in this area. See 110 Cong.Rec. 13650-52 (1964); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Sanders v. Dobbs Houses, Inc.*, 5 Cir., 1970, 431 F.2d 1097, cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971).

Third, the debates surrounding the Equal Employment Opportunity Act of 1972, Pub.Law No. 92-261, 86 Stat. 103, which amended Title VII, offer additional evidence of congressional approval. For example, legislative sentiment in support of the Executive Order program surfaced in successful opposition to a renewed attempt to make Title VII the exclusive federal remedy. See 118 Cong.Rec. 3371-73 (1972) (remarks of Senator Williams); *id.* at 3962, 3964 (remarks of Senator Javits). Additional support can be inferred from the defeat of a proposal to transfer the program to the Equal Employment Opportunity Commission. See *id.* at 1387-98. Other aspects of the Act which were enacted into law illustrate congressional contemplation of the program's continuance. See, e.g., 42 U.S.C. §§ 2000e-14, 2000e-17. To be sure, the legislative history does not show, in so many words, congressional ratification of the particular aspect of the Executive Order program here at issue, viz., the imposition by operation of the Order of the non-discrimination clause on all government contractors, regardless of whether the employers have expressly consented to the clause. However, Congress not only

has refused to circumscribe the role of the Office of Federal Contract Compliance in combating employment discrimination, but has indicated a concern for the efficacy of such efforts and an intent that they would continue. The regulation in controversy is an integral part of a long-standing program which Congress has recognized and approved. We have no difficulty, therefore, in finding congressional authorization for the provision.⁸ It follows that the application

⁸ NOPSI argues that application of the Executive Order herein contravenes the principle in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in which the Supreme Court held that President Truman's seizure of the steel mills was unlawful. In *Youngstown*, however, Congress had refused to authorize governmental seizure of property as was therein attempted. Therefore, the President had acted in the face of that congressional decision and in the absence of any other power authorizing his action. See 343 U.S. at 585-89, 72 S.Ct. at 866-67. The instant case is thus distinguishable, since the Executive acted here pursuant to congressional authorization. The application of the Order today before us falls within the first category of executive power — that of maximum power — which Justice Jackson identified in his concurring opinion in *Youngstown*, 343 U.S. at 635-37, 72 S.Ct. at 870-71; see *Contractors Ass'n, supra*, 442 F.2d at 168-71. Furthermore, the analogy to a seizure is manifestly imprecise.

At oral argument, NOPSI also cited *NAACP v. FPC*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976), in which the Supreme Court held that the Federal Power Commission did not have authority under the Federal Power Act and the Natural Gas Act to issue a rule prohibiting discriminatory employment practices by the agency's regulatees. However, *FPC* does not aid appellant's position. The opinion does not hold that an agency cannot issue regulations concerning affirmative action, assuming the agency has a statutory basis for doing so, nor does it suggest that issuance of such regulations is prohibited unless Congress has authorized the agency to promulgate them. Furthermore, the Court did hold that the FPC indirectly could regulate discriminatory employment practices by its regulatees, to the extent that such practices demonstrably affected a regulatee company's labor costs. *Id.*, 425 U.S. at 666-670, 96 S.Ct. at 1810-11. Therefore, under *FPC*, a government agency can regulate discriminatory employment practices to the extent that such discrimination is related directly to the agency's functions. That principle should be read in light of *Rosetti Contracting* and *Northeast Constr.*, which involve the Executive Order herein and require only a loose relationship between the

of the Order to NOPSI is also authorized, for such action requires no extension of the regulation's coverage. The regulation incorporating by operation of the Order the nondiscrimination clause into every government contract would be a dead letter if the Government could not apply it to a government contractor like NOPSI, merely because the company refused to consent.

Although no circuit has confronted the precise legal issue today before us, we find the *Contractors Ass'n* case to be a very persuasive precedent. There the Third Circuit specifically considered the validity of the Philadelphia Plan, relating to minority hiring in

noneconomic objective, i.e., regulating employment discrimination, and the procurement function. *Rosetti Contracting, supra*, 508 F.2d at 1045 n.18; *Northeast Constr., supra*, 485 F.2d at 760-61. We also note Mississippi Power & Light's citation of *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), apparently to rebut the proposition that Congress ratifies executive orders by subsequently recognizing their existence and making reference to them. However, to the extent that the Supreme Court addressed this issue in *Mow Sun Wong*, the opinion turned on the particular facts in controversy. That case involved, *inter alia*, the question whether acquiescence by the Executive and Congress in a Civil Service Commission policy imposing a citizenship requirement on federal employees was sufficient to give the Commission rule the same support as an express statutory or presidential command. The Court held that neither appropriations acts nor executive orders in which Congress and the President, respectively, had considered the policy and spoken to it in some fashion could fairly be read as evidencing either approval or disapproval of the policy by either branch. *Id.* 426 U.S. at 104-114, 96 S.Ct. at 1906-10. The opinion makes clear, though, that the legislative history and executive orders there in dispute could arguably be taken either way, i.e., they might be read as evidencing either disapproval or approval, and it was that ambiguity which gave rise to the Court's statement. Thus, *Mow Sun Wong* is clearly distinguishable from the case at bar. The legislative history behind the program today before us lacks such ambiguity as dictated the *Mow Sun Wong* result. Furthermore, the cited case lacked the clear directive from the Executive — by Executive Order — which is the very source of the program we confront and uphold herein.

federally-assisted construction projects, which was promulgated pursuant to Executive Order 11246. The court upheld the Plan, on the ground that it was within the implied authority of the President. Insofar as the Philadelphia Plan was instituted to implement the mandate of the Executive Order in a particular geographic area and industry, the court's holding clearly flowed from a view that the Executive Order program itself was valid, at least with respect to federally-assisted construction contracts. Moreover, in language on all fours, the Third Circuit specifically stated that Executive imposition of nondiscrimination contract provisions (including an affirmative action clause) in the Government procurement area is action pursuant to the express or implied authorization of Congress. 442 F.2d at 170.

In response to the argument that a decision for the Government in this case would go beyond the Third Circuit's holding in *Contractors Ass'n*, we believe that our decision today fits within that precedent and, in fact, approves a more confined power than did the *Contractors Ass'n* court. We here impose the non-discrimination obligation on a company which, as a public utility, holds City-granted franchises and, pursuant thereto, (1) enjoys special economic advantages, including a monopoly, and (2) sells directly to the Government. To so apply the provision is far easier, in our judgment, than to apply it, as in *Contractors Ass'n*, to a mere bidder for federally-assisted construction project contracts. The ease of application is a function of both the Government's legal power and the utility's economic power in their direct contractual relationship.

E. Contract Law

The second aspect of NOPSI's attack on the Executive Order as herein applied focuses on contract law. The company contends that its lack of consent to be bound by the nondiscrimination clause distinguishes the prior cases involving the validity of the Order. Whatever, if any, authorization exists for the program is vitiated when, as here, it is imposed on a nonconsenting public utility, the company argues, because the contractual consent principle is violated. We disagree.

We find that the absence of NOPSI's consent to the Executive Order is not determinative, and does not render the prior caselaw distinguishable. Furthermore, we reject the company's contention that NOPSI is not a government contractor.

Government contracts are different from contracts between ordinary parties. See *M. Steinthal & Co. v. Seamans*, 1971, 147 U.S.App.D.C. 221, 455 F.2d 1289, 1304. See also *Vacketta & Wheeler, A Government Contractor's Right to Abandon Performance*, 65 Geo.L.J. 27 (1976). The Government has the unrestricted power to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940); *Southern Ill. Bldrs, Ass'n v. Ogilvie*, S.D.Ill., 1971, 327 F.Supp. 1154, *aff'd*, 471 F.2d 680 (7 Cir., 1972); *cf. King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Vacketta & Wheeler, supra*. Agreement to such conditions is unnecessary: where regulations apply and require the inclusion of a contract clause in

every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties. *M. Steinthal, supra*, at 1304; *J. W. Bateson Co. v. United States*, 1963, 162 Ct.Cl. 566, 569; *G. L. Christian, supra*, 312 F.2d at 424; see *Russell Motor Car Co. v. United States*, 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923). See also *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 52 S.Ct. 78, 76 L.Ed. 168 (1931); *College Point Boat Corp. v. United States*, 267 U.S. 12, 45 S.Ct. 199, 69 L.Ed. 490 (1925).⁹

A contractual relationship obviously exists between NOPSI and the Government, notwithstanding the company's attempt to disclaim government-contractor status. This contractual relationship exists by virtue of the fact that the company sells millions of dollars worth of utility services to various agencies of the Federal Government, and has done so for many years. The district court's extensive factual findings as to particular contracts aids us in this determination; however, we would reach it even in the absence of any oral or written agreements to particular terms, because the relationship so clearly reflects a contract.

Furthermore, we cannot understand how NOPSI seriously can deny status as a government contractor for the reason that it is supplying utility services to

⁹ A contract between the Government and one of its contractors need not be in writing in order to be enforceable. See, e.g., *Patten, Government Contracts — Are They Enforceable If Not in Writing?*, 7 Pub. Contract L.J. 232 (1975). Similarly, the applicability of the Executive Order to NOPSI does not depend upon the existence of a formal written contract. We do not say today that no such contract exists between NOPSI and the Government, since resolution of that question is unnecessary to our holding.

the Government pursuant to local franchises which require the company to furnish such energy to all consumers who request it. That the company services customers under local franchises does not negate the obvious fact that NOPSI renders such services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing.

NOPSI's status as a public utility, operating under local franchises granted by the City of New Orleans, and providing services to the United States, renders the utility's express consent unnecessary in light of the Executive Order. Acceptance of the benefits of the local franchises subjected NOPSI to the obligations attached thereto. *Cf. Almeida-Sanchez v. United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973). When NOPSI undertook to satisfy those obligations by selling energy to the Government, the company did so according to the terms imposed by the Government.¹⁰

NOPSI implies, in addition, that because of its public-utility status, imposition of the Executive Order's requirements would be unfair. The unfairness, the company suggests, stems from NOPSI's lack of choice as to whether to accept the Government's business. However, the fact that NOPSI is a public

¹⁰ We are not inferring here any implied or constructive agreement by NOPSI to the terms of the Executive Order. Our holding is dictated by (1) the sale by the company of energy to the Government, and (2) the fact that such sale of services was made by a company which, under City franchises, enjoyed a local monopoly in such services needed by the Government. The presence of both those elements triggered the regulation, 41 C.F.R. § 60-1.4(e), and thus, the application of the program's obligations by operation of the Order.

utility militates strongly in favor of allowing the Government to impose the obligations of the Executive Order on the company. NOPSI's franchises give it a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas. A monopolistic government supplier, unlike a seller in an ordinary market, has the economic power to resist the Executive Order. In the situation under consideration, the Government needs to buy electric energy in the New Orleans area. If NOPSI were allowed to prevail in its contentions, the Government would have to either acquiesce or else go without necessary services. Obviously, a local utility cannot force such a dilemma upon the Government. Otherwise, a valid and important nationwide federal program, set in place by the President over a third of a century ago, continued by every one of his successors, approved by Congress and applicable to all government contractors, could be nullified by any seller with a monopoly in a service, supply or property needed by the Government, just by virtue of the seller's economic position. Here, NOPSI's monopoly exists only because of local legislative action. The supremacy clause of the Constitution obviously cannot countenance such a result. We hold, therefore, that the Government can compel NOPSI to comply with the equal opportunity obligations of Executive Order 11246, even though the company has not expressly consented to be bound by that Order.

II. NOPSI's Fourth Amendment Contentions

NOPSI next contends that the Executive Order and implementing regulations violate the fourth amendment when applied to a public utility which does not

seek to do business with the Government and has not consented to the provisions of the Order. This argument parallels the company's central contention in the case, and is similarly without merit.

Section 202(5) of the Executive Order requires that all covered government contracts include a term whereby the contractor agrees to furnish all information and reports called for by the Order and implementing regulations, and to permit access to its (the contractor's) books and records by the contracting agency and the Secretary of Labor in order to determine whether the contractor is complying with the program. That provision is effectuated by 41 C.F.R. § 60-1.43, requiring that each contractor

permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order

NOPSI contends that enforcement of these provisions herein would constitute an unreasonable search and seizure, in contravention of the rule enunciated in *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). The company's argument ignores the post-*See* development by the Supreme Court of administrative search doctrine, not to mention certain pre-*See* precedents. *See, e. g., United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

In *See* the Court applied the fourth amendment warrant requirement to commercial as well as residential premises, in the context of administrative code-enforcement inspections. The Court held only that an unconsented administrative entry upon the nonpublic areas of a commercial premises "may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id.*, 387 U.S. at 545, 87 S.Ct. at 1740. The *See* Court explicitly pointed out that it did not question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *Id.*, 387 U.S. at 546, 87 S.Ct. at 1741.

The Court drew upon the latter theme in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), recognizing a broad congressional authority to fashion rules concerning the supervision and inspection of the liquor industry, based upon a long history of regulation of that industry. This authority, the Court held, included the power to determine legislatively the standards of reasonableness for searches conducted pursuant to a liquor regulatory system. *Id.*, 397 U.S. at 77, 90 S.Ct. at 777.¹¹

The Supreme Court went one step further in *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), upholding a warrantless search of a firearms dealer under the federal gun control statute. In *Biswell* the Court could not rely on a deep-rooted

¹¹ Although the Court in *Colonnade Catering* condemned warrantless entries under the system there in controversy, it is important to note, first, that the decision turned on statutory construction, and second, that the case involved a forceful entry — a situation we do not confront today.

pattern of federal regulation to justify the inspection system there in contention. However, the Court found that the system could be sustained because "[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme." *Id.*, 406 U.S. at 315, 92 S.Ct. at 1596. The same rationale controls the present case. The Government has a vital interest in achieving equal employment opportunity. The Executive Order program is designed to carry out that interest, at least with regard to the Government's own contractors. And some sort of compliance process (including procedures for the inspection of company books and records and for access to company facilities) is necessary in order to make the program work.

The *Biswell* Court, deciding not to use the dealer's submission to the search there at issue as the justification for upholding such a search, declared that "the legality of the search depends not on consent but on the authority of a valid statute." *Id.*, 406 U.S. at 315, 92 S.Ct. at 1596. That reasoning answers NOPSI's argument about lack of consent herein. As we indicated earlier in this opinion, the Executive Order and its implementing regulations have the force and effect of law, were implemented pursuant to statutory procurement authority and have been approved by Congress since being issued. Therefore, they play the same validating role as a statute. Moreover, the *Biswell* decision is premised, to a certain extent, on the idea of implied consent, *i. e.*, that such a regulated dealer, in choosing to engage in a pervasively regulated business and to accept a federal license, did so with the knowledge that it would be subject to inspection. *Id.*, 406 U.S. at 316, 92 S.Ct. at 1596. Obviously, we do not find actual consent to the inspection system at bar.

However, there is no policy justification for distinguishing between, on the one hand, a federally-licensed firearms dealer and, on the other, a public utility which, under City-granted franchises, enjoys a local monopoly and sells substantial amounts of energy to the Government, thus bringing the utility within the coverage of the federal contract compliance program. Therefore, we have no difficulty in applying, for fourth amendment purposes, the implied-consent concept of the cases involving administrative inspection of regulated businessmen, *see e. g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973), even though that concept is a legal fiction. Our reasoning is consistent with the rule earlier announced in this circuit that where, as here, the Government validly regulates any business, the Government has a right to include in its regulations the requirement that certain records be kept open to official inspection so that the administrative agency can determine whether the company is complying. *See Ray v. United States*, 5 Cir., 1967, 374 F.2d 638, 641-42 (citing 79 C.J.S. Searches & Seizures § 36, at 803), *cert. denied*, 389 U.S. 833, 88 S.Ct. 35, 19 L.Ed.2d 94 (1967); *Cf. Morton Salt, supra; Oklahoma Press, supra*. We note finally that, under the inspection procedure contemplated by the Executive Order program, "the possibilities of abuse and the threat to privacy are not of impressive dimensions," *see Biswell, supra*, 406 U.S. at 317, 92 S.Ct. at 1597, and accordingly, we sustain the program against attack on fourth amendment grounds.¹²

¹² Mississippi Power & Light argues that the Executive Order's provision for Government access to a contractor's books and records is unconstitutional because: (1) the provision is without statutory authorization, and (2) it does not contain a procedure for judicial review. The argument about lack of statutory authorization is without merit in light of the pattern of congressional approval for the Executive Order program which we found in section

III. The District Court's Injunctive Order

We turn finally to NOPSI's disagreement with the district court's injunctive order. The company argues that the court lacked jurisdiction to issue that order, under which the court retained jurisdiction over this action for the purpose of enforcing the substantive provisions of the Executive Order.

We hold that, the district court having found NOPSI to be covered by the Executive Order, the task of obtaining NOPSI's compliance with the program should be left to the Government's own administrative compliance processes. Accordingly, we modify that part of the district court's opinion which retained jurisdiction over this suit and which dictated a mandate of injunction clearly contemplating substantive

I of this opinion. The argument about lack of judicial review is also without merit since, in the setting of the instant controversy, it is purely hypothetical. Here there has been no attempt to obtain access by force to the company's records without judicial approval; in fact, there has been ample judicial review in these proceedings of the Government's attempt to conduct a compliance review of NOPSI.

Since oral argument, Mississippi Power & Light has called our attention to *Brennan v. Gibson's Products, Inc.*, E.D.Tex., 1976, 407 F.Supp. 154, appeal docketed, No. 76-1526 (5 Cir. Feb. 27, 1976), a case in which a three-judge court held that an attempt by Department of Labor officials to conduct a warrantless inspection of a business, pursuant to the Occupational Safety and Health Act of 1970, violated the fourth amendment. However, *Gibson's Products* does not deter us from the conclusion we have reached. As the three-judge court pointed out, the company involved there was not licensed and had no history of close regulation, and the statutory provisions which appeared to authorize the search were not limited to such businesses, but instead embraced "the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." *Id.*, 407 F.Supp. at 161-62. Furthermore, there was no reason to believe that the thing sought to be controlled by the regulatory system before the court existed in the area to be searched. *Id.* at 162. Therefore, *Gibson's Products* is manifestly distinguishable from both the instant case and those cases upon which we have relied.

enforcement of the Executive Order. Our decision is based on equitable considerations, and should not be read as holding that the district court lacked jurisdiction in any respect for its ruling. Resolution of NOPSI's objections to the court's injunctive order is therefore unnecessary to our holding; however, we proceed to dismiss all of the company's present objections in order that they may not be interposed again as obstacles to enforcement of the program herein.

NOPSI makes two major arguments in this regard. The first is that the Government has failed to follow the procedural requirements of the Executive Order and implementing regulations. NOPSI alleges that the Government was required to proceed by conciliation and persuasion, but instead chose to pursue litigation in its compliance strategy. In addition, NOPSI contends that the Government has failed to afford the company a hearing mandated under the program. In support of these assertions, NOPSI relies on a number of regulatory provisions. We need not respond to each assertion specifically, in view of the fact that the Government's attempts to conduct a voluntary compliance review of NOPSI date back to 1969.

The regulations now in effect¹³ provide for the institution of administrative or judicial enforcement proceedings in response to violations of the Executive Order. Violations may be found, based upon, *inter alia*,

- (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review

¹³ See note 5 *supra*.

to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations . . . or (vii) any substantial or material violation or the threat of [such] a . . . violation of the contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

41 C.F.R. § 60-1.26(a)(1). The district court found such a violation. The regulations further provide that whenever the Director of the Office of Federal Contract Compliance has reason to believe that there exists the threat or fact of violation of the Order or regulations, the Director

may institute administrative enforcement proceedings . . . or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief . . . and to seek such additional relief, including back pay, as may be appropriate. *There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter.*

Id. § 60-1.26(a)(2) (emphasis added).

The preceding regulation plainly rebuts NOPSI's first contention.¹⁴ And the regulation also refutes NOPSI's second major assertion, which is that the Justice Department cannot bring judicial proceedings to enforce the provisions of the Executive Order until the OFCC or the compliance agency (here the General Services Administration) has first exhausted the administrative procedures of the program. Two more observations are in order as to the exhaustion argument. First, the cases cited by NOPSI in support of that contention involve private actions and are, therefore, inapposite to the situation where the Government itself has decided to pursue judicial litigation in enforcing Executive Order 11246.¹⁵ Second, while we recognize that, as NOPSI argues, substantial arguments can be mustered for application of the exhaustion doctrine, we nevertheless have no reason to read an exhaustion requirement into a program which clearly and deliberately provides judicial enforcement as an alternative to administrative enforcement, and which explicitly rejects procedural prerequisites to judicial enforcement.

Despite our conclusion that the district court had both the jurisdiction and the power to direct by injunc-

¹⁴ As to NOPSI's argument that the Government was required to proceed by conciliation and persuasion, we think that the facts described at the outset of our opinion indicate that such efforts took place. In addition, we find no conflict between 41 C.F.R. § 60-1.26(a)(2) and section 209(b) of the Executive Order. While section 209(b) directs the contracting agency to make reasonable efforts to achieve compliance by conciliation and persuasion, those efforts are to be made pursuant to the regulations issued by the Secretary of Labor. *Id.* Thus, section 60-1.26(a)(2) qualifies the Government's responsibilities under section 209(b) of the Order, rather than vice versa, and the two provisions can be read consistently.

¹⁵ For example, to the extent that the exhaustion argument is rooted in notions of deference to the administrative process and the administrative agency, the argument has no bearing in the instant context.

tive order NOPSI's compliance, we conclude that the enforcement function in this case would be better carried out administratively by the compliance agencies. This decision is reached in the exercise of our equitable discretion, for "the manner, means and method for resolving" this dispute must be devised under "inherent equitable principles." *R. L. Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1367.¹⁶ In light of our holding that NOPSI is covered by the Executive Order and has violated it, our primary mission at this point, of course, is to render such relief as is necessary and appropriate to effectuate the mandate of the Executive Order as fully and expeditiously as possible. However, the relief imposed should not "run against the grain of fundamental fairness which should hopefully be the outcome of any equitable decree." *Id.* at 1379. In the particular setting of this case, where NOPSI has never agreed to be bound by the Order, we believe that fundamental fairness requires that the Government, armed this time with this court's opinion, now obtain the company's voluntary compliance before calling for the support of our injunctive powers.

Other equitable factors support this result. The basic approach of the Executive Order program, as implemented, is enforcement by Executive agencies,

¹⁶ *Johnson* is one of the cases cited by the Government for the proposition that the district court's retention of jurisdiction and injunctive order were justified. While those cases indicate that the district court had the authority to take the action which it took — a conclusion we do not dispute — they in no way suggest that the district court's injunctive order was required in the circumstances before us. Since we have concluded that our remedial tack will best effectuate the Executive Order, discussion of those cases is unnecessary.

in particular the Department of Labor, even though the Order itself provides the judicial enforcement alternative in section 209(a)(2). The Executive has expertise, which this court lacks, in the administration of the program, and that expertise can profitably be brought to bear on the problem at bar. Further, we see no reason to burden our scarce judicial resources with the task of supervising the enforcement of the federal contract compliance program, unless such judicial enforcement becomes necessary.

Our decision today is not an invitation to further delay by NOPSI in complying with the Executive Order. Such delay would be intolerable. In its brief, NOPSI states:

If a court of final appellant (sic) resort upholds the District Court determination that NOPSI is a government contractor notwithstanding its refusal to consent to the contractual equal opportunity provisions of Executive Order 11246, the General Services Administration and OFCC should then be afforded the opportunity to work with NOPSI in developing an appropriate affirmative action program, if indeed one is found necessary...

Brief for Appellant at 46-47.¹⁷ That statement underlies the remedial approach which we today require. We assume, based on the quoted passage, NOPSI's good faith in complying with the Order, given our holding that the company is covered by it.

¹⁷ NOPSI's statement suggests the possibility that an affirmative action program might not be found necessary. We read the regulations, however, to require a written affirmative action program. See 41 C.F.R. § 60-1.40(a).

To restate our decision, then, the appropriate government compliance agency — whether OFCC or GSA — may proceed by administrative action to obtain NOPSI's compliance with the Executive Order. Though we are removing the injunctive mandate of the district court, our decision contemplates good faith negotiations between the parties, and certain issues decided herein are precluded from further negotiation. The company cannot any longer dispute its coverage under the Executive Order, nor can the company attempt to nullify the effect of the Order's application by demanding limitation-of-scope language in any contract or proposed affirmative action program that would restrict the impact of the Order. Moreover, NOPSI has no valid fourth amendment objections to the Government's demands for access either to the company's facilities or to the company's books and records, nor can NOPSI further delay or resist compliance by insisting on merely technical or unnecessary procedural niceties.

The Government may proceed at once in enforcing the Executive Order by administrative action. The parties are advised that, having fashioned our relief on the assumption of NOPSI's good faith in complying with our decision herein, this court will look with disfavor on any future attempt to delay compliance.

MODIFIED AND AFFIRMED.

CLARK, Circuit Judge, dissenting:

The decisive question in both this case and *United States v. Mississippi Power & Light Co.*, 553 F.2d 480 (5th Cir. 1977), which we also decide today, is whether

the federal government may impose a substantial contract obligation on a public utility simply because that utility supplies energy to federal installations as required by state law and the terms of its state or municipal franchise. The majority answers in the affirmative. I respectfully disagree.

I.

In order to determine whether New Orleans Public Services Inc. [NOPSI], or Mississippi Power & Light Co. [MP&L] must comply with a comprehensive equal opportunity clause despite their explicit refusals to subject themselves to it, three issues must be resolved. First, was the issuance of the Executive Order which requires the clause be included in every federal contract a valid exercise of Presidential power? Second, what relation must exist between a person and the federal government before that person is subject to the dictates of the equal opportunity clause by operation of the Executive Order? And third, does the requisite relation exist between the federal government and either NOPSI or MP&L. Since the resolution of the second and third issues furnishes a sufficient ground for my decision of this case, I do not reach the constitutional puzzles presented by the first.¹

The relation that must exist between a person and the federal government before that person is bound by

¹ For the purposes of this dissent, I make two assumptions. The first is that the Executive Order is valid and possesses the force and effect of law. The second is that the Secretary of Labor did not exceed the rulemaking authority granted him by the Executive Order when he issued 41 C.F.R. § 60-1.4(e) (1976), as amended, 42 Fed.Reg. 3454, 3459 (1977), which incorporates the equal opportunity clause into all non-exempt government contracts by operation of the Executive Order.

the equal opportunity clause by operation of the Executive Order is defined by the text of the Order itself. Like its predecessors, Executive Order No. 11246² is not all inclusive. It was promulgated to discourage only certain classes of persons who do business with the federal government from engaging in discriminatory employment practices. The Order directs all federal contracting agencies to include the equal opportunity clause in virtually every "Government contract" consummated after October 24, 1965.³ The first provision of the clause commands the "contractor" to refrain from discrimination, and to take affirmative action to ensure non-discrimination in recruiting, hiring, promoting, and discharging his employees during the performance of his government contract.⁴ Other provisions require that he perform related tasks, such as filing reports describing his employment practices and including the clause in each of his subcontracts. On its face, then, the Executive Order extends the obligation to comply with the terms of the equal opportunity clause only to those who (1) have been awarded a federal government contract, (2) after the effective date of the Order, and (3) have not yet fully performed their contractual commitments.⁵

Although the Executive Order does not explicitly define the term "government contract," there is

² 3 C.F.R. 169 (1974).

³ *Id.* §§ 202 & 405.

⁴ *Id.* § 202.

⁵ While the Executive Order also imposes obligations on other classes of individuals, such as persons bidding for a government contract, the scope of those obligations is determined by subsequent sections of the Order itself rather than by the equal opportunity clause.

nothing in its language which suggests that anything less than a contractual relation — as those words are commonly understood in the law — between a person and the federal government was intended to suffice for coverage. The word "contract" is an unambiguous legal term of art connoting an enforceable promise or set of promises between mutually consenting parties. Turning to the "executive history" of the Order or to the Secretary's implementing regulations to vary this unambiguous meaning would be unjustifiable. "[W]here the words are plain there is no room for construction." *Osaka Shoshen Kaisha Line v. United States*, 300 U.S. 98, 101, 57 S.Ct. 356, 357, 81 L.Ed. 532 (1937), quoted in, *Hodgson v. Mauldin*, 344 F.Supp. 302, 307 (N.D.Ala.1972), *aff'd*, 478 F.2d 702 (5th Cir. 1973); *Souder v. Brennan*, 367 F.Supp. 808, 812 (D.D.C.1973). Although both of these cases involved the interpretation of a statute rather than an executive order, there is no reason why the canons of construction should not be the same.

The regulations promulgated by the Secretary pursuant to his authority to issue such rules as he deems necessary to accomplish the purpose of the Executive Order,⁶ however, might be read as taking a broader view of the meaning of the word "contract" as it is used in the Executive Order. 41 C.F.R. § 60-1.3 (1976), as amended, 42 Fed. Reg. 3454, 3458 (1977), provides:

"Government Contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of

⁶ 3 C.F.R. 169, § 201 (1974).

real or personal property, including lease arrangements. The term "services," as used in this section includes, but is not limited to the following services:

Utility . . .

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

Since regulations issued pursuant to a valid executive order stand on no better footing than regulations issued pursuant to a statute, it follows that the Secretary's regulations possess the force and effect of law only if they are "(a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable." 1 K. Davis, *Administrative Law Treatise* § 5.03, p. 299 (1958) & § 29.01-1, p. 654 (Supp.1976). The Executive Order requires the presence of the equal opportunity clause only in contracts. If the term "agreement" used in Section 60-1.3 was intended to be more inclusive it would be void since it would exceed the scope of the Secretary's rulemaking authority. As the Supreme Court recently stated:

The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is " 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' "

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668, 688 (1976), quoting *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528, 531 (1936). The same principle is applicable here.

Moreover, even if the Executive Order could be read to cover parties to unenforceable agreements or non-contracts, the federal government's position would not be measurably advanced. The Executive Order merely requires contracting agencies to include the equal opportunity clause in their bid lettings and contracts. The supplementary regulation, Section 60-1.4(e), provides only that the clause is in the contract whether or not the agency remembered to put it there. Therefore, it is necessary that an enforceable contract exist between a person and the government if there is to be a basis for the enforcement of the clause. If the clause were placed in a void agreement, it would fail with the rest.

NOPSI and MP&L are public utility companies. Although their arrangements with their respective regulatory authorities are not identical in form,⁷ the effect is the same. Because they hold franchises granted by a state or a city are engaged in an enterprise affected with the public interest, and hold themselves out as being willing to serve all members of the public, both NOPSI and MP&L have a duty to provide the types of energy they distribute to anyone within their

⁷ NOPSI supplies electricity and natural gas to residents of New Orleans pursuant to an indeterminate permit issued by the New Orleans City Council in 1922. MP&L operates under a franchise granted to it by the Mississippi Public Service Commission in 1956.

certificated area who requests it and complies with reasonable conditions of service. *Morehouse Natural Gas Co. v. Louisiana Public Service Commission*, 242 La. 985, 999-1000, 140 So.2d 646, 651 (1962); *Capital Electric Power Association v. Mississippi Power & Light Co.*, Miss., 218 So.2d 707, 713 (1968). In exchange, they receive the right, to some extent exclusively, to supply utility service to customers within their certificated area at a price set by their regulatory authority, and they are guaranteed a reasonable rate of return on their investment.

Since the majority has described the history of NOPSI's interaction with the federal government, only brief recap is necessary here. NOPSI has furnished federal installations with utility service for more than fifty years. In *United States v. New Orleans Public Service, Inc.*, 8 FEP 1089, 8 EPD 9795 (E.D.La.1974), the court found that NOPSI currently supplied twenty-two federal facilities with electricity, natural gas, or both. In some instances there is a written agreement between NOPSI and the federal government concerning essential terms, such as the applicable rate and volume of service demanded, while in others the understanding is unwritten. Although most of these arrangements pre-date the Executive Order, a few were entered into after it became effective. The price term of every agreement was changed as recently as 1973, when the New Orleans City Council revised NOPSI's rate schedule, and on at least one occasion since the issuance of the Order the government requested and received additional service at one of its locations. Recently, when NASA insisted that its proposed written agreement with NOPSI contain the equal opportunity clause NOPSI

refused to capitulate. Instead, NOPSI informed NASA it would continue to supply NASA's energy requirements at the regulated price as both its franchise and Louisiana law require, but expressly refused to subject itself to the equal opportunity clause.⁸

Government contracts do differ from contracts between private parties in some respects, see J. Paul, *United States Government-Contracts and Subcontracts* 69-75 (1964), but no such difference affects the result here. Although contracts of the United States are governed by federal law, *United States v. Seckinger*, 397 U.S. 203, 210, 90 S.Ct. 880, 884, 25 L.Ed.2d 224, 232 (1970), "[i]t is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 410-412, 68 S.Ct. 123, 125-26, 92 L.Ed. 32, 37-38 (1947), *quoted in, Security Life & Accident Insurance Co. v. United States*, 357 F.2d 145, 148 (5th Cir. 1966). One of the most fundamental of those principles is that to be enforceable, a contract must be supported by valid consideration. *Estate of Bogley v. United States*, 514 F.2d 1027, 1033, Ct.Cl. (1976); 1 S. Williston, *Contracts* § 99, p. 367 (3d ed. 1957); 1A A. Corbin, *Contracts* § 114, p. 498 (1963). There is no reason why this rule should not apply to contracts with the federal government; at least one court has assumed that it does. See *United States v. Marchetti*, 466 F.2d

⁸ Since MP&L's interaction with the federal government contains the same essential elements — written and unwritten arrangements for service consummated before and after the issuance of the Order, changes in the rate applicable to the government since 1965, and an express refusal to be bound by the equal opportunity clause — MP&L stands in the same posture as NOPSI, and I shall not needlessly prolong this dissent by recounting its course of dealing in detail.

1309, 1317 n. 6 (4th Cir.), *cert. denied*, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972).

A promise to perform a service which one is under a pre-existing legal obligation to perform is not valid consideration for a return promise. *United States v. Bridgeman*, 173 U.S.App.D.C. 150, 523 F.2d 1099, 1110 (1975), *cert. denied*, 425 U.S. 961, 96 S.Ct. 1744, 48 L.Ed.2d 206 (1976); 1 S. Williston, *supra*, § 132, p. 557; 1A A. Corbin, *supra*, § 171, p. 105. Nor is it merely the return promise that is unenforceable. Because the return promise is unenforceable, there is no mutuality of obligation and therefore no contract is ever formed. Of course, in the event that the party subject to the pre-existing obligation does more than his duty requires, he creates consideration sufficient to support the return promise. 1 S. Williston, *supra*, § 132, pp. 558-59; 1A A. Corbin, *supra*, § 192, p. 180.

The application of these principles to the facts of this case is straightforward. Since both NOPSI and MP&L have a pre-existing legal obligation to supply utility service to the federal installations within their certificated area at the applicable rate irrespective of their agreement to do so, their arrangements with the federal government were instances of performance of their duty to serve customers, not contracts with the federal government. Moreover, an examination of the record reveals that none of the agreements between the utilities and the federal government purported to bind either utility to treat the government any differently from the way state law obliged it to treat other customers of equal size. Therefore, neither utility is a government contractor within the meaning of the Executive Order, and neither has an enforceable

obligation to comply with the equal opportunity clause.

The majority takes the position that by accepting their franchises, NOPSI and MP&L assumed an obligation to furnish the federal government with energy on whatever terms it might wish to impose, including a requirement that they comply with the provisions of the equal opportunity clause. But there is nothing in the record which supports the notion that either the utilities or their respective regulatory authorities were aware that NOPSI and MP&L were undertaking such an obligation at the time the franchise agreements were executed. And since the franchises were agreements with a state or city rather than the federal government, no such obligation can be implied as a matter of law under Section 60-1.4(e) of the regulations. In addition, both utilities accepted their franchises long before Executive Order 11246 was issued. To impose the burden of complying with the equal opportunity clause on them because of actions pre-dating the Order would be inconsistent with Sections 202 & 405 which indicate that the order is triggered only by actions taken after October 24, 1965.

The majority also suggests that because NOPSI and MP&L are public utilities it is justifiable to saddle them with the record-keeping, expense, and other burdens that compliance with the equal opportunity clause entails. It contends that to permit them to use their position as the sole sources of energy within their certificated areas to force the federal government to choose between bargaining over the inclusion of the clause and doing without energy, would be in-

consistent with the Supremacy Clause.⁹ The premise of this argument is that the utilities' economic leverage is the result of state action, because purely private action cannot violate the Supremacy Clause. This premise is not supported by the record.

As the Supreme Court recognized in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 n. 8, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 484 (1974), where it held that a public utility's termination of service to a customer did not constitute state action for Fourteenth Amendment purposes, "public utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale." See 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 119-126 (1971). It is therefore unlikely that NOPSI or MP&L faced any greater competition at the time they accepted their franchises than they do today, and there is nothing in the record to show that they did. If they did not, then by granting them franchises their respective regulatory authorities did little more than acknowledge their pre-existing positions as the sole suppliers of energy within their certificated areas. It appears that the laws of economics rather than those of a state made it possible for NOPSI and MP&L to amass the leverage they possess.

The facts of this case present no conflict between the franchises and the Executive Order. The franchises were created to ensure that a dependable supply of energy would be available to inhabitants of New Orleans and Mississippi at a regulated price. Here, the

⁹ U.S.Const., Art. VI, cl. 2.

federal government has availed itself of the benefits of this policy by requiring the utilities to supply it with service under and in accordance with the terms of their franchises, just as any other inhabitant might do. The validity of the franchises and the purposes they are intended to serve have not been challenged, but rather affirmed. This is not a case in which a regulatory authority or a franchise holder has invoked a franchise to bar the United States from generating its own energy or from contracting with someone other than the franchise holder as a source of supply. Nor has the United States shown that it is impossible for energy to be otherwise obtained. At most the government suggests that the franchise holders operating under the terms of their franchises are the cheapest sources of energy within their certificated areas. Even the government cannot have the best of all worlds: low-priced energy and a contract vehicle for making the equal opportunity clause enforceable.

II.

Had the court adopted the position of this dissent, the effectiveness of the Executive Order as a tool for eliminating discrimination in employment would not have been destroyed. The vast majority of those supplying goods and services to the federal government are not under a pre-existing legal obligation to do so, but rather are contractors within the meaning of the Order. Nothing said here would affect the applicability of the provisions of the equal opportunity clause to them. Nor would such a decision leave public utilities at liberty to treat their employees as they pleased. There are a plethora of state and federal measures

designed to eliminate discriminatory employment practices to which they are subject.

I do not dissent to defend discriminatory employment practices. But when the government has chosen to attack them through the mechanism of inserting a non-discrimination clause in its contracts rather than by enacting a statute, there are limits to what it can accomplish. Those limits have been exceeded here. The majority makes a mistake when it allows the government to forge ahead to a desirable end by means that stand the law of contracts on its head.

APPENDIX C

United States Court of Appeals
Fifth Circuit

Office of the Clerk
August 17, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-1130 — U.S.A. v. New Orleans Public Service,
Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing on behalf of appellant, New Orleans Public Service, Inc., and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ BRENDA M. HAUCK
Deputy Clerk

P. S.: Judge Clark dissents from the panel's refusal to rehear this case for the reasons set forth in his previous dissent in United States v. New Orleans Public Service, Inc., 553 F.2d 459.

APPENDIX D

Constitutional Provisions, Statute, Executive
Order and Regulations InvolvedFourth Amendment to the Constitution
of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution
of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

40 U.S.C. 486

(a) The President may prescribe such policies and directives, not inconsistent with the provisions of this

Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

(b) The Comptroller General after considering the needs and requirements of the executive agencies shall prescribe principles and standards of accounting for property, cooperate with the Administrator and with the executive agencies in the development of property accounting systems, and approve such systems when deemed to be adequate and in conformity with prescribed principles and standards. From time to time the General Accounting Office shall examine such property accounting systems as are established by the executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems, and the Comptroller General shall report to the Congress any failure to comply with such principles and standards or to adequately account for property.

(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

(d) The Administrator is authorized to delegate and to authorize successive redelegation of any authority transferred to or vested in him by this Act (except for the authority to issue regulations on matters of policy having application to executive

agencies, the authority contained in section 754 of this title, and except as otherwise provided in this Act) to any official in the General Services Administration or to the head of any other Federal agency.

(e) With respect to any function transferred to or vested in the General Services Administration or the Administrator by this Act, the Administrator may (1) direct the undertaking of its performance by the General Services Administration or by any constituent organization therein which he may designate or establish; or (2) designate and authorize any executive agency to perform such function for itself; or (3) designate and authorize any other executive agency to perform such function; or (4) provide for such performance by any combination of the foregoing methods. Any designation or assignment of functions or delegation of authority to another executive agency under this section shall be made only with the consent of the executive agency concerned or upon direction of the President.

(f) When any executive agency (including the General Services Administration and constituent organizations thereof) is authorized and directed by the Administrator to carry out any function under this Act, the Administrator may, with the approval of the Director of the Bureau of the Budget, provide for the transfer of appropriate personnel, records, property, and allocated funds of the General Services Administration, or of such other executive agency as has theretofore carried out such function, to the executive agency so authorized and directed.

(g) The Administrator may establish advisory committees to advise with him with respect to any function transferred to or vested in the Administrator by this Act. The members thereof shall serve without compensation but shall be entitled to transportation and not to exceed \$25 per diem in lieu of subsistence, as authorized by section 73b-2 of Title 5, for persons so serving.

(h) The Administrator shall advise and consult with interested Federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this Act.

(i) If authorized by the Administrator, officers and employees of the General Services Administration having investigatory functions are empowered, while engaged in the performance of their duties in conducting investigations, to administer oaths to any person.

Executive Order No. 11246
Provides in Part:

"Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

* * *

PART II — Nondiscrimination in
Employment by Government
Contractors and Subcontractors

SUBPART A — DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B — CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for

employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency

or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2)

for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C — Powers And Duties Of The Secretary Of Labor And The Contracting Agencies

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such

officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of

Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D — Sanctions And Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such

contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of

Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

Subpart E — Certificates Of Merit

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed un-

der or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III — Nondiscrimination Provisions in Federally Assisted Construction Contracts

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to fur-

nish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303 (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of

non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order. *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV — Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All rec-

ords and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

41 C.F.R. 60-1.3

"Administering agency" means any department, agency and establishment in the Executive Branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

"Administrative Law Judge" means an Administrative Law Judge appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

"Agency" means any contracting or any administering agency of the Government.

"Applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

"Compliance Agency" means the agency designated by the Director on a geographical, industry or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of the Order as the Director may determine to be appropriate.

"Construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any Government contract or any federally assisted construction contract.

"Contracting agency" means any department agency, establishment, or instrumentality in the Executive Branch of the Government, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor or any person to whom he delegates authority under the regulations in this part.

"Equal opportunity clause" means the contract provisions set forth in § 60-1.4(a) or (b), as appropriate.

"Federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participated in the construction work.

"Government" means the Government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

"Minority group" as used herein shall include, where appropriate, female employees and perspective female employees.

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Order", "Executive Order", or "Executive Order 11246" means Parts II, III, and IV of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such Order, and any other Executive order superseding such order.

"Person" means any natural person, corporation, partnership unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the Order.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor

"Rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the Order.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed

"Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the Order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

"United States" as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States. (As last amended, effective February 17, 1977)

41 C.F.R. 60-1.4

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their

race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor

or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer;

recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its

own employment practices when it participates in federally assisted construction work: *Provided*, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any

further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(Subsection 60-1.4 (b) (2) on federally assisted construction contracts was rescinded by publication in the Federal Register, effective March 28, 1975.)

(c) *Subcontracts*. Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference*. — The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate.

(e) *Incorporation by operation of the Order*. — By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written. (Subsections (d) and (e), as revised, effective February 17, 1977)

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings. (As last amended March 28, 1975)

41 C.F.R. 60-1.43

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the order and the rules and regulations pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60-60, Contractor Evaluation Procedures For Nonconstruction Contractors; 41 CFR Part 60-40. Examination and Copying of OFCCP Documents.)

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA**

CROWN ZELLERBACH CORPORATION,

Plaintiff,

Civil Action

versus

No. 77-1833

Section "C"

RAYMOND MARSHALL, ET AL.,

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S OPPOSITION TO
THE IMPOSITION OF A PRELIMINARY OR A
PERMANENT INJUNCTION**

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

CROWN ZELLERBACH CORPORATION,
Plaintiff,

versus C.A. No. 77-1833
Section "C"

RAYMOND MARSHALL, ET AL.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S OPPOSITION TO
THE IMPOSITION OF A PRELIMINARY OR A
PERMANENT INJUNCTION

This action arises out of defendants' attempts to enforce as against Crown Zellerbach Corporation, Executive Order 11246, as amended (3 CFR 339), which prohibits employment discrimination on the basis of race, sex, color, religion, and national origin by Government contractors. Defendants have charged Crown Zellerbach Corporation (hereinafter sometimes referred to as Crown, Crown Zellerbach, or the Corporation) with, *inter alia*: a) unlawful sex discrimination in employment at its Bogalusa, Louisiana facilities; b) the failure and refusal to take contractually required affirmative action toward named affected class members (including the provision of back pay and retroactive seniority where appropriate); and c) the failure and refusal to take other affirmative action, such as the implementation of adequate goals and timetables for the hiring and promo-

tion of women, as a condition to the receipt of future Government contracts.

Through this action, the Company seeks to enjoin the defendants (hereinafter sometimes referred to as the Government) from denying Crown Zellerbach any Government contracts for its failure to take the affirmative action steps outlined above on the alleged grounds that Crown is entitled to a hearing prior to the denial of Government contracts, and that the relief sought by the Government (e.g. back pay and retroactive seniority for individual affected class members) cannot be recovered without violating the Constitution and Federal law. Plaintiff also seeks a preliminary and permanent injunction against the recovery of back pay and other relief by the Government regardless of whether Crown receives a hearing prior to the imposition of sanctions against it.

Defendants will show in this Memorandum that further injunctions should be denied because the Director of OFCCP, through the issuance of a substantial issues of law or fact determination, has removed any possibility that Crown will be sanctioned prior to a hearing for failure to provide individual affected class relief at its Bogalusa facilities. Defendants will also show that no further injunctions should be entered because there is little likelihood that plaintiff will prevail on the merits of its claim. Specifically, defendants will show that plaintiff has failed to exhaust its available administrative remedies, that the regulations at issue are valid and enforceable, and that back pay and related relief is recoverable for third party beneficiaries (i.e. affected class members) under Executive Order 11246, as amended. Defendants will fur-

ther show that it is not in the public interest that the Government be enjoined from enforcing the Executive Order.

I. THE EXECUTIVE ORDER PROGRAM

Executive Order 11246 became effective on October 24, 1965. Like its predecessors,¹ it prohibited discrimination on grounds of race, color, religion and national origin by Federal contractors and subcontractors. In 1967, it was amended by Executive Order 11375, which added sex discrimination to the prohibited practices. Section 201 of the Executive Order provides that the Secretary of Labor shall be responsible for the administration of Part II of Executive Order 11246 which deals with "Nondiscrimination in Employment by Government Contractors and Subcontractors," and it authorizes him to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes" of the Executive Order.

Pursuant to Section 202 of the Executive Order, each Government contractor or prospective contractor who is not exempt² from the provisions of the Executive Order, agrees, as a condition of his contract with the United States, to *inter alia*, the following:

¹ A summary and description of the various Executive Orders which have prohibited discriminatory employment practices by government contractors since World War II is found in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (C.A. 3, 1971), cert. denied, 404 U.S. 854.

² The Secretary of Labor has exempted Government contractors who do less than \$10,000 annual business with the United States from the coverage of Executive Order 11246 [41 CFR 60-1.5(a)]. That exemption is not applicable here.

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising layoff or termination; *rates of pay or other forms of compensation*; and selection for training, including apprenticeship . . ." (emphasis supplied).

"(4) *The contractor will comply with all provisions of Executive Order No. 11246 . . . and of the rules, regulations, and relevant orders of the Secretary of Labor.*" (emphasis supplied).

"(6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 . . . and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 . . . or by rule, regulation, or

order of the Secretary of Labor . . ." (emphasis supplied).

The Executive Order also provides, *inter alia*, for compliance reports (Section 203); and investigations of the contractor by the Secretary of Labor (Section 206). Section 208 authorizes the Secretary of Labor to provide for hearings prior to imposing sanctions, and specifically prohibits any order for debarment from further Government contracts under Section 209(a)(6) of the Order "without affording the contractor an opportunity for a hearing."³ There is no hearing requirement prior to the cancellation, termination or suspension of existing contracts. [See Sections 208 and 209(a)(5)]. Section 211 provides that if the Secretary of Labor so directs:

"contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency."

Pursuant to the powers granted him in Section 201, the Secretary of Labor has issued regulations im-

³ In addition, Congress has provided in Section 718 of Title VII of the Civil Rights Act of 1964, as amended, that:

"No Government contract, or portion thereof, with any employer shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication. . ." 42 U.S.C. § 200e-17. (emphasis supplied).

plementing the Executive Order [see 41 Code of Federal Regulations, Chapter 60 [hereinafter 41 CFR *et seq.*]].⁴

The Secretary's regulations repeat Section 202 of the Executive Order in its entirety [41 CFR 60-1.4(a)], and they provide, *inter alia*, as follows:

1. That where a projected contract exceeds \$1 million in value, the prospective contractor is subject to a compliance review before the award of the contract. No such contract can be awarded unless a "preaward compliance review" of the prospective contractor is conducted within 12 months prior to the award. In order to qualify for the award of such a contract, the bidder must be found to be in compliance with both 41 CFR 60-1.20(b) and 41 CFR Part 60-2 [41 CFR 60-1.20(d)].

2. Where deficiencies are found, reasonable efforts must be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the Executive Order, it must make a specific commitment in writing to correct the deficiencies which must include the precise action to be taken and the dates for completion. [41 CFR 60-1.20(d)].

3. Employers with 50 or more employees and a contract of \$50,000 or more must develop a written affirmative action compliance program for each of their

⁴ Except for his regulations-making power, the Secretary of Labor has assigned responsibility for enforcement of the Executive Order to the Director of the Office of Federal Contract Compliance Programs (OFCCP) [41 CFR 60-1.2].

establishments [41 CFR 60-2.1(a)]. Relief, "including back pay where appropriate,"⁵ must be provided for "members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination . . ." [41 CFR 60-2.1(b)]. In addition, employers subject to the requirements of 41 CFR Part 60-2, must, *inter alia*:

(a) Conduct a utilization analysis [41 CFR 60-2.11];

(b) Establish goals and timetables [41 CFR 60-2.12]; and

(c) Comply with the Secretary of Labor's regulations on sex discrimination [41 CFR Part 60-20].

The Secretary of Labor has also provided procedures for determining "responsibility" for the award of Government contracts [See generally 41 CFR 60-2.2(b) and (c)]. Where a prospective contractor is determined to be "nonresponsible" for the award of a Government contract, the prospective contractor has the right to request a determination by the Director of OFCCP that the responsibility of the bidder raises "substantial issues of law or fact to the extent that a

⁵ Prior to February 17, 1977, the regulations, while requiring relief for affected class members suffering the current effects of past discrimination, did not specifically mention back pay. However, back pay under the Executive Order has been recovered since at least 1967, and on a regular basis since 1969. The only Court to specifically consider the issue has held that back pay is recoverable under the Executive Order even though not specifically mentioned in the Executive Order and even though not specifically mentioned in the Secretary of Labor's regulations which were in effect at that time. *United States v. Duquesne Light Company*, 423 F. Supp. 507 (W. D. Pa., 1976).

hearing is required". Regardless of whether such a determination is requested, when a bidder is determined to be non-responsible more than once, the compliance agency must request that enforcement proceedings be initiated pursuant to 41 CFR 60-1.26. [41 CFR 60-2.2(b)]. The Director of OFCCP interprets 41 CFR 60-2.2(b) as allowing the "pass over" of a bidder for the award of no more than two contracts for the same deficiency at a given establishment without providing the opportunity for a hearing. The Director further interprets 41 CFR 60-2.2(b) as requiring that where two such pass overs have occurred, a hearing is required prior to any additional pass overs for the same deficiency at a given establishment [Affidavit of Weldon Rougeau, which was served by U. S. Mail in this action on June 18, 1977 (hereinafter Rougeau Affidavit)].

In addition, the Secretary of Labor has provided for administrative and judicial enforcement of the Executive Order [41 CFR 60-1.26], and hearing rules for administrative enforcement [41 CFR Part 60-30.30]. These rules provide, *inter alia*, for "Recommended decisions" by an Administrative Law Judge after a Hearing [41 CFR 60-30.27]; the filing by the parties, of exceptions to Recommended decisions [41 CFR 60-30.28]; and for a "Final Administrative Order" which may provides appropriate sanctions and remedies [41 CFR 60-30.30].⁶

⁶ The current hearing rules, which became effective on January 18, 1977, are published at 42 F.R. 3462.

II. THE DIFFERENCE BETWEEN A SUSPENSION (I.E., "PASS OVER") FROM THE AWARD OF GOVERNMENT CONTRACTS AND A "DEBARMENT"

Both the Federal Procurement Regulations and the Armed Services Procurement Regulations provide a clear distinction between a "debarment" on the one hand and a "suspension" (i.e. "pass over") from the award of contracts on the other.

A. The Federal Procurement Regulations.

Pursuant to authority granted by the Federal Procurement Act, 40 U.S.C. § 486(c), the Administrator of GSA has provided in 41 CFR 1-1.6 of the Federal Procurement Regulations for "Debarred, Suspended, and Ineligible Bidders." Subpart 1-1.6 provides,⁷ in pertinent part, as follows:

1. "§ 1-1.600 Scope of subpart.

"This subpart prescribes policies and procedures relating to: (a) The debarment of bidders for cause, (b) the suspension of bidders for cause under prescribed conditions, and (c) the placement of bidders in ineligibility status for violations of the provisions of the Equal Opportunity clause . . ."

2. "§ 1-1.601 General.

"Debarment, suspension, and placement in ineligibility status are measures which may

⁷ See Appendix A hereto.

be invoked by the Government either to exclude or to disqualify bidders and contractors from participation in Government contracting or subcontracting. . . ." (emphasis supplied).

3. "§ 1-1.601-1 Definitions.

"(a) 'Debarment' means, in general, an exclusion from Government contracting and subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense or failure or the inadequacy of performance. However, in connection with Executive Order 11246 . . . , as implemented by the rules, regulations and relevant orders of the Secretary of Labor in 41 CFR Part 60, the term 'debarment' also means an exclusion by reason of ineligibility under the Secretary's rules from Government contracting or subcontracting for an indefinite period of time pending the elimination of the circumstances for which the exclusion was imposed." (emphasis supplied).

"(b) 'Suspension' means a disqualification from Government contracting and subcontracting for a temporary period of time because a concern or individual is suspected upon adequate evidence (see § 1-1.605) of engaging in criminal, fraudulent, or seriously improper conduct." (emphasis supplied).

The regulations also provide for: (1) "Establishment and maintenance of a list of concerns or individuals

debarred, suspended, or declared ineligible" (§ 1-1.602); (2) "Bases for entry on the debarred, suspended, and ineligible bidders list" § 1-1.602-1); (3) "Treatment to be accorded firms or individuals in debarred, suspended, or ineligible status" pursuant to which it provides that debarred contractors under the Executive Order's Equal Opportunity clause (Section 202) are not to be awarded Government contracts [1-1.603(d)]; (4) "Causes and conditions applicable to determination of debarment by an executive agency" (§ 1-1.604); (5) Procedural requirements relating to the imposition of debarment (§ 1-1.604-1); and, (6) "Suspension of Bidders" (§ 1-1.605). In 41 CFR § 1-1.605-1, entitled "Causes and conditions under which executive agencies may suspend contractors," the Administrator of GSA has provided in pertinent part that:

"(a) An agency may, in the interest of the Government, suspend a firm or individual:"

"(1) Suspected, upon adequate evidence of —

"(2) For other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the agency to warrant suspension. However, suspensions related to matters involving the EEO clause shall be handled in accordance with regulations which may be prescribed by the Secretary of Labor." (emphasis supplied).

"(b) A suspension invoked by an agency for any of the causes set forth in (a)(1) and (2) of

this § 1-1.605-1 may be the basis for the imposition of a concurrent suspension by another agency."

In 41 CFR § 1-1.605-2, the Administrator has provided that the period of suspension "shall be for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;" and in addition, he has provided for Notice of suspension (§ 1-1.605-3); and Hearings (§ 1-1.605-4). However, neither notice or a hearing is required prior to actual suspension. Finally, in 41 CFR § 1-1.605-5, the Administrator has provided that:

"During a period of suspension of a firm or individual . . ."

"(a) Bids and proposals shall not be solicited from suspended contractors. If received, bids and proposals shall not be considered and awards for contracts shall not be made to suspended contractors unless it is determined by the agency to be in the best interest of the Government." (emphasis supplied).

B. The Armed Service Procurement Regulations.

The Armed Services Procurement Regulations also provide a clear distinction similar to that provided under the Federal Procurement Regulations between a "debarred" and "suspended" Contractor (see generally 32 CFR Part 6 entitled "Debarment, Ineligibility and Suspension" which is attached hereto as Appendix D).

III. STATEMENT OF FACTS

On August 17, 1976, the General Services Administration (GSA) conducted a "pre-award" compliance review of Crown Zellerbach Corporation's Container Plant at its Bogalusa, Louisiana facility. In a September 8, 1976 letter, GSA informed Crown Zellerbach of the possible existence of an affected class of female incumbent employees and rejected applicants at its Bogalusa facility.

On September 20, 1976, GSA requested that Crown provide GSA with copies of its 1976 Affirmative Action Plans (AAPS) for its Paper mill, Grocery Bag Plant and Multi-wall Bag Plant at its Bogalusa facility, and it also requested that Crown supply other pertinent support data.

On October 2, 1976, GSA attempted, by letter, to schedule a compliance review of the Paper Mill and Bag Plants for November 15, 1976. Pursuant to mutual agreement, the review was scheduled for November 29, 1976, and it was conducted by GSA from November 29-December 3, 1976.

On February 10, 1977, GSA informed Crown Zellerbach of the existence of an affected class of incumbent and rejected applicant females, and it listed proposed steps which it believed Crown should take in order to come into compliance with Executive Order 11246, as amended. On March 14, 1977, Crown Zellerbach sent GSA a "rebuttal" letter; and on March 24, 1977, GSA sent Crown a letter in response to Crown's March 24 letter.

On April 7, May 11, and June 9, meetings were held between GSA and the Company in an attempt to resolve the issues. These efforts were unsuccessful, and on June 10, 1977 Crown filed in this Court for a temporary restraining order and a preliminary and permanent injunction seeking to bar the Government from denying Crown future Government contracts. Prior to filing this action, Crown did not avail itself of its right to request a substantial issues of law or fact determination from the Director of OFCCP pursuant to 41 CFR 60-2.2(b).

Hearings were held on Crown Zellerbach's request for a temporary restraining order on June 10, June 14, and June 20, 1977. In the interim, on June 17, 1977, Crown Zellerbach requested, pursuant to 41 CFR 60-2.2 (b) that the Director of OFCCP determine that there are substantial issues of law and fact "concerning the eligibility, qualifications and right of female employees to back pay, transfer rights, constructive seniority, and other remedies;" and that the claims and proposed remedies involved substantial factual and legal questions including:

"the signed waivers of female employees to promotional opportunities; application of State protective laws prior to adoption by the OFCCP policies that such criminal protective laws could not be complied with; the desire and qualifications of female employees for certain jobs; and the principles that will be applied in determining eligibility and type of remedy for particular employees." (See Appendix C, hereto).

At the June 20 hearing the Court granted a temporary restraining order (which was issued in written form on June 23, 1977) enjoining the defendants from adversely affecting Crown Zellerbach's ability to seek and obtain Government contracts with the United States or contracts with contractors having contracts with the United States, based upon Crown's failure to provide relief for alleged violation of past Government contracts without affording Crown notice and hearing on any issues of alleged discrimination arising out of past conduct at its Bogalusa facilities. However, the Court did not enjoin the defendants from requiring Crown, as a condition of receiving future Government contracts, from, *inter alia*, agreeing not to discriminate in employment on the basis of sex or from agreeing to goals and timetables for the hiring and promotion of females. In addition, the Court did not enjoin the Government from canceling, terminating, or suspending any current Crown Zellerbach contracts for plaintiff's past discrimination in employment against females.⁸

On June 28, 1977, the Director of OFCCP issued a substantial issues of law and fact determination in which he granted that portion of plaintiff's June 17 request, *supra*, which deals with the identity of individual affected class members and the relief due them on an individual basis. Pursuant to that determination, Crown Zellerbach Corporation will not be "sanctioned" (e.g., denied Government contracts) for its failure to provide such relief prior to a hearing and a

⁸ By mutual agreement, the temporary restraining order was extended until July 6, 1977, at which time the Court will entertain argument on plaintiff's request for a preliminary injunction.

final decision by the appropriate reviewing authority under the Executive Order (see Appendix D, hereto).⁹

ARGUMENT

The standards for obtaining interlocutory relief are clear and well settled. In order to obtain such relief, a plaintiff must show (1) irreparable injury, (2) probability of success on the merits, (3) lack of harm to third parties, and (4) lack of harm to the public interest. See, e.g., *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (C.A.D.C., 1958). Here, plaintiff cannot meet these standards, and its request for a preliminary injunction should thus be denied.

A. Plaintiff Will Not Suffer Irreparable Injury

Plaintiff, in support of its motion for a temporary restraining order, relied upon, *inter alia*, an affidavit by M. S. Denman to the effect that denial of Government contracts would have a severe economic impact upon a Crown Zellerbach sawmill in Estacada, Oregon. The Court found that Crown would in fact suffer irreparable injury if it were denied future Government contracts because of its failure to provide affected class and related relief for alleged discrimination in employment arising out of past conduct by Crown Zellerbach Corporation at its Bogalusa facilities.

⁹ The Director's June 28, 1977 determination, *supra*, was filed with the Court in this action pursuant to a June 30, 1977 Affidavit executed by Louis G. Ferrand, Jr.

We do not believe that Mr. Denman's Affidavit supports the conclusion that Crown would have suffered irreparable damage at its Estacada sawmill.¹⁰ However, such possibility of irreparable injury has been removed by the Director of OFCCP's June 28, 1977 issuance of a substantial issues of law or fact determination regarding the issues of the identity of individual affected class members and the relief due them on an individual basis. (Statement of Facts, *supra*). Thus, with regard to those issues, plaintiff will continue to be eligible for Government contracts during the administrative or judicial enforcement hearing and pending a final decision by the appropriate Executive Order reviewing authority. If administrative enforcement is taken against plaintiff pursuant to 41 CFR 60-1.26 and 41 CFR Part 60-30 for its failure to provide affected class relief, it will continue to be awardable for contracts, [provided it complies with other Executive Order requirements such as goals and timetables], until such time as the Administrative Law Judge files his Recommended decision (41 CFR Part 60-30.27); and a Final Administrative Order is issued (41 CFR Part 60-30.30), [See Section I, *supra*]. That Order is appealable in Federal

¹⁰ In his Affidavit, Mr. Denman stated that the "cutting rights" on the two contracts in issue in his Affidavit cover cutting rights through 1981 at the Mount Hood National Forest, and that if Crown did not obtain the contracts, it would, in "all probability", have to shut down its operations for a period of 4 and one half months at some time prior to 1981. The Government submits that the alleged "irreparable" injury as stated by Mr. Denman in his Affidavit is tentative at best. For example, is it reasonable to assume that prior to 1981, there will be no further timber cutting contracts available at the Mount Hood National Forest? Further, is it reasonable to assume that Crown Zellerbach will not be able to secure other, non-Federal timber cutting contracts to cover 4 and one half month's work in the next 3 and one-half years? We respectfully suggest that it is not, and that there has therefore been no showing of an irreparable injury.

court, and Crown Zellerbach would be able to seek an injunction against the imposition of sanctions pending disposition of the matter in the District Court. Moreover, after exhaustion of administrative remedies and judicial review thereof, plaintiff might be able to avoid sanctions altogether simply by bringing itself into compliance with the Executive Order.

Clearly, Crown Zellerbach is not now under any imminent threat of being declared ineligible for Government contracts because of its failure to provide affected class relief for past violations of Government contracts. Therefore, it will not suffer irreparable injury if the preliminary injunction is denied.

In addition, there is no right, constitutional or otherwise, to the continued enjoyment of Government business. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1939). The privilege of competing for Government business may be conditioned at the Government's discretion so long as such conditions are imposed in a manner consistent with the requirements of due process. *Gonzalez v. Freeman*, 334 F.2d 570 (C.A. D.C., 1964); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 168-171 (C.A. 3, 1971), *cert. denied*, 404 U.S. 854. The administrative procedures for a substantial issue determination and hearing and review set forth in the Secretary's regulations satisfy due process requirements and afford plaintiff all of the protections to which it is entitled [5 U.S.C. § 554(a)(2)].

B. Plaintiff Is Unlikely To Succeed On The Merits Of Its Challenge To The Validity Of The Regulations Or In Its Challenge To The Recoverability Of Back Pay And Seniority Relief Under The Executive Order.

1. *This Matter Is Not Ripe For Judicial Review Because Plaintiff Has Not Exhausted Its Administrative Remedies.*

It has long been settled that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This rule of judicial administration has been adopted and ratified by Congress in the Administrative Procedure Act. For, except as otherwise provided by statute, Congress made only "final agency action" subject to judicial review. 5 U.S.C. §704. Any rule to the contrary would substitute the courts for the administrative agency as the decision maker in the first instance, and preclude the Government from correcting the errors or excesses of its subordinate officials.

Although the requirement for exhaustion of administrative remedies commonly involves an administrative process fashioned by statute, it is fully applicable to the administrative procedures for resolving disputes between the federal government and its contractors. *United States v. Blair*, 321 U.S. 730, 735-736 (1944); *United States v. Bianchi & Co.*, 373 U.S. 709 (1963). Furthermore, the requirement is applicable even where plaintiff challenges the validity of the administrative action.

The Court of Appeals for the District of Columbia recently refused to intervene in an analogous case where a contractor challenged the Secretary of Labor's authority to seek back pay under the Executive Order. *Kerr Glass v. Usery*, No. 75-2225, (C.A. D.C., Jan. 27, 1977), slip opinion (Appendix E hereto). In that case, the Secretary of Labor had issued a thirty day Notice to Show Cause why enforcement proceedings should not be instituted because of Kerr Glass' refusal to award back pay to remedy an affected class problem identified by compliance officials. The company went immediately to district court, claiming that it should not be required to exhaust administrative remedies since the Secretary's authority to require back pay could not be resolved at the administrative level and because it would be vulnerable to sanctions prior to completion of the administrative process. The court of appeals rejected the company's arguments, and found instead that (1) there was no threat of sanctions prior to completion of the administrative process, and (2) the Company could raise issues concerning the government's authority at the administrative level and thus preserve the issue for judicial review at such time as a final administrative order was entered, at which time it might also apply for a judicial stay *pendente lite*. The reasoning of the court of appeals in *Kerr Glass* is wholly applicable to the case at hand, and thus all further injunctions should be denied based on plaintiff's failure to exhaust administrative remedies.

2. *The Word "Debarment" Is a "Term of Art."*

At the June 20, 1977 Hearing, the Court stated its impression that the word "Debarment" is not a "term of

art" and that the word has no historic or technical meaning (Transcript, p. 7). Defendants have since examined the Federal Procurement Regulations and the Armed Services Procurement Regulations. As shown in Section II, *supra*, both provide strong support for the contention that the term debarment is in fact a "term of art" and that a "suspension" from the award of contracts for a temporary period of time is not a debarment (see also 41 CFR 1-1.601, *et seq.* and 32 CFR Part 6 in Appendices C and D respectively).

While neither the Armed Services Procurement Regulations nor the Federal Procurement Regulations use the word "pass over," [which is the word used by the Director of OFCCP to describe a limited suspension pursuant to 41 CFR 60-2.2(b) from the right to receive Government contracts], their meaning is clearly similar since a "pass over" is limited to a temporary period of time (i.e. no more than two "pass overs" for the same deficiency at the same establishment without the opportunity for a hearing) (see Section I, *supra*, and the Rougeau Affidavit, *supra*).

3. A "Suspension" or "Pass Over" of a Bidder Is Not Proscribed by Section 208(b) of the Executive Order.

Section 208(b) of the Executive Order provides that "no order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing." However, as shown in Section II, *supra*, and subpart B, 2, *supra*, a suspension from the award of Government contracts for a limited period of time

and a debarment are not the same thing. Thus, Section 208(b) does not by its express terms prohibit the use of suspensions (or pass overs) without a hearing.

a. The Debarment Provisions of the Executive Order Should Be Viewed in the Context of Debarment Under Other Federal Laws Applicable to Government Contractors; and in the Context of Other Sections of the Executive Order

The debarment provisions of the Executive Order should be viewed in the context of debarment under other federal labor standards laws applicable to Government contractors. There, debarment is for a three-year period. [See the Davis-Bacon Act of 1931, as amended, providing for minimum wages and fringe benefits to mechanics and laborers employed on Government construction contracts, 40 USC 276(a), *et seq.*; the Service Contract Act of 1965, as amended, requiring similar provisions for employees of federal service contractors, 41 USC 351, *et seq.*; and the Walsh-Healy Public Contracts Act of 1936, requiring such provisions for employees of Government supply contractors, 41 USC 35 *et seq.*].

In addition, Section 208(b) of the Executive Order should be read in light of Sections 201, 202(6), and 211 of the Executive Order.

Section 201 authorizes the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate" to achieve the purpose of the Executive Order.

Section 211 provides that:

If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Section 202(6), which is part of the EEO clause which every bidder must commit itself to as a condition to receiving Government contracts, states that in the event of the contractor's noncompliance with the Executive Order and the Secretary of Labor's implementing rules and regulations, the contract may be cancelled, terminated, or suspended and the contractor declared ineligible¹¹ for further Government contracts in accordance with procedures authorized in the Executive Order. In addition, such other sanctions may be imposed and remedies invoked as provided by the Executive Order or by rule, regulation, or order of the Secretary of Labor. Thus, it is clear that so long as he does not violate the requirements of the Executive Order, the Secretary may require both remedies and sanctions which are not specifically set forth in Executive Order 11246.

Section 211 does not by its express terms require

¹¹ For purposes of the Federal Procurement Regulations, "ineligibility" under the Executive Order is the same as "debarment" but is not the same as "suspension" from the award of Government contracts. See Section II, *supra*; Appendices C and D, *supra*.

any prior hearing on the responsibility or awardability of a bidder for Executive Order purposes. However, the Court indicated at the June 20 Hearing that it believed that Section 208(b) requires a hearing prior to a "pass over" because of the Court's belief, based upon evidence and arguments submitted up to that date, that there was no distinction between a debarment and a pass over. As we show in this Memorandum, the word "debarment" is a term of art, and therefore, Section 208(b) does not, by its express terms prohibit suspensions or pass overs from the award of Government contracts.¹²

b. Nonresponsibility Determinations
Under 41 CFR 60-2.2(b) Are Consistent
with Procurement Law Principles.

Under Federal procurement law, purchases must be made only from, and contracts must be awarded to, "responsible" prospective contractors. 41 USC 253(b) and 10 USC 2305(c). While it is important that purchases be made on the basis of offers which are most advantageous to the Government, price and other factors considered, this does not require an award to an offeror solely because it submits the lowest bid or offer. The award of a contract based solely on price considerations does not facilitate the procurement of property and services if the contractor subsequently defaults in its contractual obligations. Therefore, contracting officers are required by the

¹² As shown in footnote No. 3, *supra*, Congress prohibited the denial or withholding of a contract in certain circumstances without a hearing. By implication, at least, Congress was, by its action, attempting to reach something other than a debarment since a hearing prior to a debarment was already required under Section 208(b) of the Executive Order.

Federal Procurement Regulations to make responsibility determinations regarding the prospective contractor's ability to perform the proposed contract. See generally 41 CFR Subpart 1-1.12; 41 CFR 1-2.404-2(e). Such determinations are made by the contracting officer without any prior adjudication. 41 CFR 60-1.1. Similar provisions on responsibility determinations are contained in the Armed Services Procurement Regulations (ASPR) at 32 CFR Part 9. See Comptroller General Decisions B-175845 (March 9, 1973) and B-183966 (Oct. 2, 1975). [see Appendices F and G, hereto, respectively].

Under 41 CFR 1-1.1202(a), a responsible prospective contractor must, *inter alia*, meet the standards set forth in §1-1.1203-1, which states:

Except as otherwise provided in this §1-1.1203, a prospective contractor must:

(a) Have adequate financial resources, or the ability to obtain such resources as required during performance of the contract;

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental;

(c) Have a satisfactory record of performance. Contractors who are or have been seriously deficient in current or recent contract performance, when the number of contracts and the extent of deficiency of each are

considered, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, shall be presumed to be unable to meet this requirement. Past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility (see §1-1.708 if a small business concern is involved);

(d) Have a satisfactory record of integrity and business ethics (see §1-1.708-2 if a small business concern is involved); and

(e) *Be otherwise qualified and eligible to receive an award under applicable laws and regulations, e.g., see Subparts 1-12.6 and 1-12.8. (Emphasis supplied)*¹³

Under 41 CFR 60-2.1 and 41 CFR 60-2.2(b),¹⁴ a contractor/bidders' compliance with the nondiscrimination and affirmative action obligations of Executive Order 11246 is a matter of responsibility under federal procurement procedures. Therefore, failure of a contractor/bidder to remedy an "affected class" problem through back pay, seniority modifications and other appropriate relief and/or failure to adopt or implement an approved or approvable affirmative action program meeting Executive Order 11246 standards renders the contractor nonresponsible with regard to the proposed contract for which the responsibility determination is being made.

¹³ Subpart 1-12.8 deals with equal employment opportunity under the Executive Order.

¹⁴ 42 F.R. 3461-62 (Jan. 18, 1977); Corrections, 42 F.R. 5978 (Feb. 1, 1977).

Nonresponsibility determinations under 41 CFR 60-2.2(b) are predicated upon the theory that the extent of a bidder's present adherence to equal employment policies and practices is indicative of its ability to comply with the equal employment clause of the prospective contract, and that failure to remedy prior affected class discrimination before contract award will perpetuate such discrimination under the prospective contract, thereby violating the EEO clause of that contract. [See 41 CFR 1-1.1203-1 on reliance on the bidder's past non-EEO practices in responsibility determinations]. Nonresponsibility determinations under 41 CFR 60-2.2(b) are not used as an alternative means to seek redress for past violations of E.O. 11246 since these procedures may be used for only two "pass overs" of the prospective contractor without a hearing pursuant to 41 CFR 60-1.26. Moreover, the responsibility procedures of 41 CFR 60-2.2(b) are not limited to prior federal contractors, but to bidders who are seeking their first federal contract. In the case of both the first time prospective Government contractor and the frequent Government contractor, the same question is asked: "Will that prospective contractor be able to comply with the EEO clause of the prospective contract in that it will not discriminate and will take affirmative action during the term of the contract and will have remedied any prior discrimination which would otherwise be perpetuated under that contract?" See 41 CFR 60-2.1(b); 41 CFR 60-2.2(b); 41 CFR 60-1.20(d).

As indicated above, the process of making responsibility determinations under Executive Order 11246 is consistent with basic procurement principles under which contracting officers, without any prior hearing

on the matter, routinely declare contractor/bidder nonresponsible when, for various reasons (e.g. insufficient production capacity or inadequate capitalization), the contractor/bidder is unable to comply with the terms and conditions of the prospective contract. In this case, we are dealing with one of the factors considered by contracting officers in determining responsibility for future contract awards, i.e., an offeror's ability to comply with the equal employment specifications and the requirements of future Federal procurements. See 41 CFR 60-2.2(a)(1).

A determination of nonresponsibility relates solely to the particular procurement for which the determination is being made and does not extend, as a debarment would, beyond that particular procurement. Hence, in upholding the previous version of 41 CFR 60-2.2(b) (which as indicated in the Rougeau Affidavit is identical to the present version), the Comptroller General held with regard to the Alton Box Board Company that:

"Your protest also raises a question as to whether the nonresponsibility determination, and the subsequent denial of contract award, without a formal hearing as to your compliance status resulted in a *de facto* debarment without due process. In this regard, Executive Order 11246 authorizes, and is implemented by, the regulations of the Department of Labor, appearing in chapter 60 of Title 41 of the Code of Federal Regulations. The order, in pertinent part, authorizes contracting agencies to refrain from entering into further contracts

with any noncomplying contractor and requires that no *order for debarment* be made without affording the contractor an opportunity for a hearing. In our opinion the determination of nonresponsibility in this case does not constitute an "order for debarment" from further contracts within the meaning of the Executive order. Rather, it would appear to be in the nature of a limited or temporary suspension, which is permitted by OFCC's implementing regulations. As provided in the regulations a finding of noncompliance could result in no more than two determinations of nonresponsibility prior to effectuation of formal hearing procedures on the debarment issue. As a general rule, temporary or limited suspension by way of such summary action does not of itself result in a denial of due process. See *Gonzalez v. Freeman*, 334 F.2d 570, 579 (1964); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153 (1941) and *R.A. Holiman & Co. v. Securities and Exchange Commission*, 299 F.2d 127, 131-133, *cert. denied*, 370 U.S. 911 (1962). In our opinion there are procedural safeguards in the applicable regulations to protect bidders from repeated nonresponsibility determinations which might result in a *de facto* debarment without the requisite hearing. We are therefore unable to agree that the failure to offer you a hearing prior to declaring you nonresponsible was a violation of due process. 551 Comp. Gen. 551, 555 (B-174816, March 2, 1972).

Similarly, the United States District Court for the Southern District of New York specifically held that 41 CFR 60-2.2(b) was not violative of Section 208 of the Executive Order, the Constitution, on other federal law:

"Even granting, however, that plaintiff has standing to sue under the APA, I find that the plaintiff cannot demonstrate the requisite probability of success necessary to sustain a preliminary injunction in this case.

"Under Section 60-2.2(b) the finding of nonresponsibility is permissible without a prior hearing. Plaintiff argues that the other sections mentioned above, with respect to the requirement of hearings as to cancellation, termination, debarment, and ineligibility, require the finding that Section 60-2.2(b) is violative of the express mandate of the Executive Order.

"The only requirement for a hearing under the Executive Order is in a debarment case. A debarment is a total bar to receipt of a contract for a period of time, not a single finding of nonresponsibility. It has been held that a single determination of nonresponsibility does not result in a *de facto* debarment because its effect does not extend beyond the contract with respect to which the nonresponsibility was found. See, e.g., *Washington Moving and Storage Co. v. Sampson*, 188 CCF 182,336, at 87,637 (D.D.C. June 20, 1973); *Comp. Gen. Dec. No. B-175 845*, 18 CCF 182,110, at 87,342 (March 9, 1973).

"Further, there is no statutory requirement for a hearing prior to a determination of non-responsibility. Cf. Comp. Gen. Dec. No. B-154006, 9 CCF ¶172,668 (June 14, 1964). No constitutional right to a hearing on responsibility has ever been found in cases of government contract determinations. Counsel has cited no authority to his end, and the court has found none. However, the "right" here in question, even if sufficient to grant standing, is not of the type discussed in *Goldberg v. Kelly*, 397 U.S. 254 (1970) or its progeny." *Commercial Envelope Mfg. Co. v. Dunlop*, 11 FEP Cases 117, 119-20 (S.D. N.Y. 1975). [But See *Crown Zellerbach Corp. v. Wirtz*, 281 F. Supp. 337 (D.D.C., 1968)].¹⁵

The two pass over limitation in 41 CFR 60-2.2(b) is at most a very limited and temporary suspension from contract awardability and provides a rational means for ensuring that the Government will not be awarding contracts and subsidizing employers with serious

¹⁵ In *Crown Zellerbach v. Wirtz*, the Court enjoined the Government from cancelling any of Crown's Government contracts, and it also enjoined the Government from denying Crown any Government contracts without the opportunity for a hearing. The *Wirtz* case is factually different from the case at bar. In that case, [unlike the case at bar], all issues had originally been resolved between the OFCC and the Company, and the Company had implemented their mutual agreements with the exception of certain seniority provisions which the Papermakers Union refused to accept. It may have been that under the specific circumstances of that case, Judge Sirica felt that an injunction was appropriate. However, insofar as his decision lumped temporary suspensions from the award of contracts together with debarments under the prohibitions of Section 208(b) of the Executive Order, we believe that his decision was in error. As shown in this Memorandum, Federal Procurement Regulations and Armed Services Procurement Regulations make a clear distinction between debarments and suspensions, and the prohibition in Section 208(b) only reaches debarments.

equal employment problems which would preclude their compliance with Section 202 of the Executive Order in the performance of future contracts. At the same time, it ensures bidders a right to be heard in a timely manner through administrative or judicial enforcement proceedings since no bidder, absent a hearing, can be denied more than two contracts for the same deficiency at the same establishment (see Section I, *supra*, and the Rougeau Affidavit).¹⁶

Temporary suspensions of limited duration do not violate due process requirements nor constitute *de facto* debarments so long as the suspended bidder is provided an opportunity to demonstrate the lack of adequate evidence to warrant suspension. *Gonzalez v. Freeman*, 334 F.2d 570, 579 (C.A. D.C., 1964); *Horne Brothers Inc. v. Laird*, 463 F.2d 1268 (C.A.D.C., 1972);¹⁷ *Adamo Wrecking Co. v. Department of Housing and Urban Development*, 414 F. Supp. 877 (D.D.C. 1976).

¹⁶ It should be noted that the two pass over limitation in 41 CFR 60-2.2(b) is far less than the unlimited number of pass overs that could be undertaken for non-EEO reasons during a normal temporary suspension period. See, e.g., 41 CFR 1-1.605-3; 1-1.605-5.

¹⁷ Although *Horne Brothers*, *supra*, held that the suspended party should be provided an opportunity to be heard within 30 days to demonstrate the lack of adequate evidence to warrant suspension, this time frame should not be controlling under 41 CFR 60-2.2(b) since the Court there was concerned with a *total suspension* from further Government contracting for a period of a year or more. Under 41 CFR 60-2.2(b), such an unlimited suspension, which has no regard for the number of contracts that a bidder might wish to bid upon during the suspension period, could not occur, since no more than two pass overs can occur for a given deficiency without a hearing. Furthermore, the Court in *Horne Brothers* specifically stated that its remarks should not be taken to mean that in every suspension action, the Government must offer the contractor a hearing within one month of its suspension; and that there may be reasons why the Government should not be required to show its evidence to the contractor, such as the concern that such a proceeding may prejudice a prosecutorial action against the contractor. 462 F.2d at 1271-72.

Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252, 1259-60 (C.A.2, 1975), the principle case relied upon by plaintiff in support of its contention that a pass over is a debarment is not in point because in that case, there appeared to be an open-ended debarment by the Postal Service for no fixed period of time. By way of contrast, in the case at bar, there can be no more than two pass overs for a given deficiency.

In *Myers & Myers*, the Court did not rule on whether failure to renew the six contracts at issue was a debarment or a suspension, but stated:

"* * * Since the record we have from the district court does not reveal, except by way of the General Counsel's statement, whether the Postal Service action in this case was, in effect, a debarment or something else, note 7 *supra*, it will be necessary to remand for purposes of determination of this point on the basis of the evidence.* * *" 527 F.2d at 1260.

The Secretary of Labor's regulation [41 CFR 60-2.2(b)] is also consistent with the holding in *Washington Moving & Storage Company v. Sampson*, (D.D.C. No. 936-76, June 19, 1973), wherein the plaintiff contended that a General Services Administration nonresponsibility determination based on an uncompleted Labor Department debarment proceeding against the plaintiff for wage violations under the Service Contract Act amounted to a *de facto* debarment without procedural due process under the Service Contract Act [see Appendix H, hereto]. The Court

held that this pass over did not constitute a *de facto* debarment, even though the bidder had been declared nonresponsive twice for the same alleged wage violations, [Slip Op., p. 3-4]. The Court stated:

GSA had even more of a rational basis than NASA on which to rest a nonresponsibility determination because of the alleged Service Contract Act violations. Debarment has now been recommended. It cannot be said to be irrational for the contracting officer to rely on this recommendation in finding nonresponsibility based on the absence of a satisfactory record of integrity and business ethics. *De facto* debarment has not occurred. The plaintiff is not barred from future bids by the single determination here. [Slip opinion, p. 5].

Similarly, the fact that a bidder such as Crown can be passed over no more than twice for the same equal employment violation without a hearing does not invalidate 41 CFR 60-2.2(b).

- c. The Director of OFCCP's Administrative Interpretation Regarding the Meaning of 41 CFR 60-2.2(b) Is Entitled to Great Deference by this Court.

At the June 14, 1977 Hearing in this case, there was discussion regarding whether or not 41 CFR 60-2.2(b) allows a prospective bidder to be passed over only once or up to two times prior to a hearing. At that time, the Court stated that the language could be interpreted as allowing one pass over. Defendants subsequently

filed an Affidavit executed by the Director of OFCCP which states that the current and past Directors have interpreted the language of 41 CFR 60-2.2(b) as allowing up to two pass overs for the same deficiency at the same establishment prior to a hearing.

The Director of OFCCP is empowered by the Secretary of Labor to administer the Executive program (41 CFR 60-1.2). The Director's interpretation of 41 CFR 60-2.2(b) as allowing no more than two pass overs is not inconsistent with the requirements of Sections 208(b), 202(6) and 211 of the Executive Order, since a bidder is guaranteed a right to a hearing before it can be passed over more than two times. Under the circumstances, we respectfully suggest that the Director's interpretation is entitled to deference by this Court. See e.g., *Udall v. Tallman*, 380 U.S. 1 (1965); *Power Reactor Dev. Co. v. International Union of Electric, Radio & Machine Workers*, 367 U.S. 396, 408 (1961).

4. *Crown Zellerbach Is Not Likely to Prevail in its Challenge to the Concept of Back Pay Recovery or Seniority Relief Under Executive Order 11246.*

In its Complaint, Crown Zellerbach challenges the legality of the recovery of back pay and seniority relief under Executive Order 11246. As shown below, Crown is not likely to succeed in its challenge to the legality of these remedies when recovered under appropriate circumstances.

It is well established that Executive Order 11246, as amended, has the force and effect of law [*United States v. NPSI*, *supra*, 14 EPD 7602, p. 4966]; that Title VII of

the Civil Rights Act of 1964, as amended, does not constitute a limitation on the Executive Order [see, e.g., *Contractor's Association of Eastern Pennsylvania v. Secretary of Labor*, *supra*, 442 F.2d 149, 172-173; *United States v. Mississippi Power and Light Company* — F. Supp. — (S.D. Miss., 1975), 9 EPD 7749, p. 7753, *aff'd*, — F.2d — (C.A. 5, 1977), 14 EPD 7603];¹⁸ that the Government may require a prospective contractor to agree to equal employment opportunity requirements as a condition to becoming eligible for the award of contracts [*Contractor's Association*, *supra*; *Southern Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154, *aff'd*, 471 F.2d 680 (C.A. 7, 1972)].¹⁹ Likewise, the fact that goals and timetables or back pay are not specifically mentioned in the Executive Order does not bar their recovery in appropriate circumstances. See, e.g., *Contractor's Association*, *supra*, and *Southern Illinois Builders Association v. Ogilvie*, *supra*, [goals and timetables]; and *United States v. Duquesne Light Co.*, *supra*, 423 F. Supp. 507, 509-510 [back pay]. [See also, *United States, et al. v. Allegheny-Ludlum Industries, Inc., et al.*, 517 F.2d 826, 834-835, 838, 871-873 (C.A. 5, 1975), *cert. denied*, 425 U.S. 944 (1976)²⁰; see, in addition, *Johnson v. Railway Ex-*

¹⁸ See also the discussion in *United States v. NPSI*, *supra*, regarding the legislative history surrounding Title VII and the Executive Order. 14 EPD 7602, pp. 4967-4969.

¹⁹ While the *Contractor's Association* and *Southern Illinois* cases, *supra*, involved federally assisted construction contracts, and not direct federal procurement, the same standards are applicable. See, e.g., *United States v. Duquesne Light Co.* *supra*, 423 F.Supp. 507; *EEOC, et al. v. American Telegraph and Telephone Co.*, — F.2d — (C.A. 3, 1977), 14 FEP cases 1210.

²⁰ Back pay is specifically authorized in 41 CFR 60-1.26 and 41 CFR 60-2.1. In addition, authority for its recovery may be found in Section 202(6) of the Executive Order which provides, *inter alia*, for "remedies" invoked as provided in the Executive Order or "by rule, regulation or order of the Secretary of Labor . . ."

press Agency, Inc., 421 U.S. 454, 460 (1975)].²¹

The case of *International Brotherhood of Teamsters v. United States* — U.S. —, 45 USLW 4506 is not applicable to the recovery of seniority under the Executive Order since that case involved Title VII's protection or immunization of a "bona fide" seniority system. There is no similar protection for such a system under the Executive Order. Not only has it consistently been the policy under both Executive Order 11246 and its predecessor Executive Order 10925 to seek retroactive or "carry over" seniority in appropriate circumstances, but the policy was in effect under Executive Order 10925, from at least 1963. Thus, it predated Title VII (see the Hobson and Bierman Affidavits which were filed in this action by U.S. mail on June 18, 1977).²² In addition, in *Contractor's Association of Eastern Pennsylvania v. Secretary of Labor*, *supra*, the Court of Appeals specifically held that Sec-

21 In the *Johnson v. Railway Express* case, *supra*, the Supreme Court reviewed the broad language in 42 U.S.C. 1981 and held that it affords a federal remedy against discrimination in private employment and that "a back pay award under § 1981 is not restricted to the two year period specified in Title VII." 421 U.S. at 460. Likewise, Title VII does not limit the recoverability of back pay under the Executive Order.

22 There is also little chance that plaintiff will prevail in its argument that its prior reliance on State "protective" statutes immunizes it from the granting of carry over seniority to women predating 1970. The Secretary of Labor's regulations provide in 41 CFR Part 60-20 that:

"(f)(1) An employer must not deny a female employee the right to any job that she is qualified to perform in reliance upon a State 'protective' law . . ." (effective June 9, 1970)

Arguments similar to those raised by Crown in this case were raised under Title VII, and were also found to be without merit. See, e.g., *Palmer, et al. v. General Mills, et al.*, 513 F.2d 1040 (C.A. 6, 1975). [Note: while Title VII precedents are not binding on the Executive Order, it is sometimes appropriate to look to Title VII case law for guidance in situations where Title VII is not more restrictive than the Executive Order].

tion 703(h) of Title VII, [which was the basis for the decision of the *International Brotherhood of Teamsters* case, *supra*,] is not a limitation on the Executive Order:

"The unions, it is said, refer men from the hiring halls on the basis of seniority, and the Philadelphia Plan interferes with this arrangement since few minority tradesmen have high seniority. Just as with § 703(j), however, § 703(h) is a limitation only upon Title VII, not upon any other remedies." See also *EEOC, et al v. American Telephone and Telegraph Company*, — F.2d — (C.A. 3, 1977), 14 FEP Cases 1210. (emphasis supplied).

Therefore, Crown will not succeed in its challenge to the recoverability of back pay or seniority relief under the Executive Order.

C. It Would Not Be in the Public Interest to Enjoin the Government from Enforcing the Executive Order.

An injunction will harm the public interest in having expeditious procurement and in enforcing Executive Order 11246. There is a strong public interest in avoiding disruptions in procurement and for withholding judicial interjection in the procurement process. *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). An injunction would frustrate the great public interest in assuring that public contracts are awarded to contractors who will be able to meet the equal employment specifications of their contracts. This policy is an integral part of the total procurement

process. *Contractors Assn. of Eastern Pa. v. Secretary of Labor, supra*. See also *Rossetti Contracting Co., Inc. v. Brennan*, 508 F.2d 1039 (7th Cir. 1975). An injunction would make Crown awardable, notwithstanding its egregious noncompliance with Executive Order 11246, as amended. The Government should not be put in the position of being forced to disregard its regulations and thereby make Crown awardable under the Executive Order. See *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

CONCLUSION

For the reasons stated above, no further injunctions should be granted in this case, and plaintiff's request for a preliminary injunction should be denied.

Respectfully submitted,

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Nos. 77-497 and 77-605

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-497

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 77-497 (Pet. App. 63a-108a) is reported at 553 F. 2d 459. The opinion of the district court in that case (Pet. App. 1a-62a) is reported at 8 F.E.P. Cases 1089.

The opinion of the court of appeals in No. 77-605 (Pet. App. A1-A12) is reported at 553 F. 2d 480. The opinion of the district court in that case (Pet. App. A60-A77) is reported at 10 F.E.P. Cases 1084.

JURISDICTION

The judgments of the court of appeals were entered on June 6, 1977, and petitions for rehearing were denied on August 17, 1977. The petition for a writ of certiorari in No. 77-497 was filed on September 30, 1977, and the petition in No. 77-605 was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a public utility that sells its services to various agencies of the federal government is subject to the provisions of Executive Order No. 11246 and implementing regulations.

STATEMENT

A. THE EXECUTIVE ORDER AND IMPLEMENTING REGULATIONS

Section 202 of Executive Order No. 11246, 30 Fed. Reg. 1239 (Pet. No. 77-497 App. 114a), requires that all government contracts include an equal opportunity clause prohibiting the contractor from discriminating in employment on account of race, color, religion, sex or national origin and requiring the contractor to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin."¹

¹Section 204 of the Order (Pet. No. 77-497 App. 118a) permits the Secretary of Labor to exempt certain classes of contracts from the operative provisions of the Order. The exemptions adopted by the Secretary (41 C.F.R. 60-1.5) are not applicable here.

Regulations promulgated by the Secretary of Labor (41 C.F.R. 60-1.3, Pet. No. 77-497 App. 132a)² define a government contract as "any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease agreements. The term 'services' * * * includes but is not limited to the following services: Utility * * *."

The equal opportunity clause required by the Executive Order obligates the contractor to furnish all information and reports required by the Executive Order and the Secretary's regulations and orders, and to permit the contracting agency to have access to contractor books and records to ascertain compliance with the order and the regulations (Executive Order No. 11246, Section 202(5), Pet. No. 77-497 App. 115a; see 41 C.F.R. 60-1.43, Pet. No. 77-497 App. 142a).

The Secretary's regulations further provide (41 C.F.R. 60-1.4(e), Pet. No. 77-497 App. 141a):

By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

²Section 201 of Executive Order No. 11246 (Pet. No. 77-497 App. 114a) directs the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes" of the Order.

B. THE FACTS

1. Petitioner in No. 77-497, New Orleans Public Service, Inc. (hereinafter "NOPSI"), is a public utility that produces, distributes, and sells electric power to consumers located in that part of New Orleans, Louisiana, on the east bank of the Mississippi River, and sells and distributes natural gas to consumers throughout New Orleans (Pet. No. 77-497 App. 65a).

NOPSI sells natural gas and electricity pursuant to permits issued by the City Council of New Orleans, and its activities and prices are regulated by the City Council. Pet. No. 77-497 App. 4a. It is the sole company with permits to supply New Orleans with natural gas and to supply the east bank of the city with electricity (*ibid.*).³

Federal agencies and installations in New Orleans are major purchasers of utilities from NOPSI. *Ibid.* In 1973, NOPSI received more than \$2,680,000 from the federal government for utility services. Pet. No. 77-497 App. 65a-66a. Nine federal agencies have each paid NOPSI more than \$10,000 annually for utility services since 1965. Pet. No. 77-497 App. 66a.⁴ Federal agencies, like other consumers, are billed monthly and pay for the services on a regular basis (*ibid.*).

³Consumers located on the east bank of the city have no alternative source of electricity (Pet. No. 77-497 App. 65a). NOPSI also supplies the city with most of its natural gas service, and in the few instances where natural gas is obtained from other sources, NOPSI has agreed to the arrangement and has built and maintained the transmission line connecting the consumer with other facilities at the parish boundary. *Ibid.*

⁴The largest user is the Michoud Assembly Facility of the National Aeronautics and Space Administration, which paid approximately \$1.4 million for utility services in 1973. Pet. No. 77-497 App. 66a.

NOPSI supplies the federal government with utility services pursuant to various contractual arrangements.⁵ Twenty-two federal agencies are supplied under written agreements (Pet. No. 77-497 App. 21a-33a); six other federal agencies are supplied utilities under arrangements "which are not in the form of formal written agreements signed by both defendant NOPSI and the federal agencies to whom NOPSI supplies utility services" (Pet. No. 77-497 App. 33a-42a). Although some of the written agreements were executed prior to October 24, 1965, the effective date of Executive Order No. 11246, all were modified by revised rate schedules in 1973 (Pet. No. 77-497 App. 21a-33a).⁶ Nevertheless, none of the written agreements expressly contains the nondiscrimination clause required by Executive Order No. 11246.⁷ In some cases, NOPSI refused to sign a proposed new contract because it contained that clause (Pet. No. 77-497 App. 28a, 31a, 39a-40a).

In 1969, the federal government began efforts to conduct a review of NOPSI's records to investigate its compliance with Executive Order No. 11246 (Pet. No. 77-497 App. 36a). In March 1971, the General Services

⁵The district court discussed the details of these contractual arrangements (Pet. No. 77-497 App. 21a-42a). The court of appeals, however, held that the "long-standing seller-purchaser relationship indisputably makes NOPSI a government contractor" and found it unnecessary to inquire into "further contractual underpinning[s]" between NOPSI and the government agencies it services (Pet. No. 77-497 App. 68a, n. 3).

⁶The Executive Order applies to subsequent modifications of contracts entered into before its effective date (41 C.F.R. 60-1.3, Pet. No. 77-497 App. 132a; Executive Order No. 11246, Section 209(a)(6), Pet. No. 77-497 App. 122a).

⁷A few of them contain nondiscrimination clauses required by earlier Executive Orders. See, e.g., Pet. No. 77-497 App. 21a, 22a, 23a.

Administration (GSA) notified NOPSI of its conclusion that the equal opportunity clause required by Executive Order No. 11246 was a part of all NOPSI contracts with federal agencies, whether the contracts were written or unwritten (Pet. No. 77-497 App. 42a). In July 1972, the Director of the Office of Federal Contract Compliance of the Department of Labor (OFCC, the office responsible for administering the Executive Order, Pet. No. 77-497 App. 71a) confirmed this conclusion, and informed NOPSI that he had determined, pursuant to the Secretary of Labor's regulations, that NOPSI was a federal contractor subject to Executive Order No. 11246 and the rules and regulations issued pursuant to that Order (Pet. No. 77-497 App. 43a). When NOPSI persisted in its refusal to permit a government inspection of NOPSI's records as part of a compliance review (Pet. No. 77-497 App. 44a), the United States brought suit to compel NOPSI's compliance with the Executive Order (see Section 209(a)(2) of the Order, Pet. No. 77-497 App. 122a).

2. Petitioner in No. 77-605, Mississippi Power & Light Co. (MP&L), is a public utility franchised by the Mississippi Public Service Commission to supply electricity in a large part of the western half of Mississippi, including the cities of Jackson, Clarksdale, Senatobia, Grenada, McComb, Natchez, and Vicksburg (Pet. No. 77-605 App. A60). MP&L is the primary supplier of electricity in that part of the state, and, by virtue of its franchise, it must supply electricity to anyone requesting it, including federal government agencies (*ibid.*). The government has no alternative source of electrical services (Pet. No. 77-605 App. A5).

MP&L has written and unwritten agreements to furnish electrical services costing more than \$10,000.00 to federal agencies at 15 government facilities (Pet. No. 77-605 App. A69). While most of the written contracts were executed prior to the effective date of Executive Order No. 11246,⁸ they have been amended through rate changes since that date (Pet. No. 77-605 App. A5).⁹ None of the written contracts expressly contains the equal opportunity clause required by the Executive Order (*ibid.*).

The government sought access to MP&L's records in 1972 and 1973 in order to conduct compliance reviews (Pet. No. 77-605 App. A6). Although the Director of OFCC informed MP&L by letter that it was a government contractor subject to the provisions of Executive Order No. 11246, MP&L denied the government access to its records on the ground that it had never agreed to comply with the terms of Executive Order No. 11246 or the implementing regulations (Pet. No. 77-605 App. A66-A67). Thereafter, the United States brought suit to compel compliance with the Executive Order and the applicable regulations (see Section 209(a)(2) of the Order, Pet. No. 77-605 App. A86).

⁸One contract—that for the Greenville Post Office and Court House—was executed after the effective date of the Executive Order. Pet. No. 77-605 App. A68. The contract proposed by the government contained the equal opportunity clause required by the Executive Order, but MP&L returned the contract unsigned (*ibid.*). In lieu of the proposed contract, MP&L substituted its "Agreement for Service" which did not contain the equal opportunity clause or a provision for access to MP&L's records (*ibid.*).

⁹See note 6, *supra*.

C. THE DECISIONS BELOW

In each case the district court declared the utility company to be a government contractor subject to the requirements of Executive Order No. 11246 (Pet. No. 77-497 App. 61a-62a; Pet. No. 77-605 App. A75-A77), and enjoined the company's refusal to comply with the Executive Order and the rules and regulations issued pursuant to it.

The court of appeals affirmed the holdings that the utility companies were government contractors subject to the requirements of the Executive Order (Pet. No. 77-497 App. 96a; Pet. No. 77-605 App. A11). Exercising its equitable discretion, however, in each case the court of appeals set aside the injunctive order of the district court. The court in *NOPSI* explained (Pet. No. 77-497 App. 93a-96a):

Despite our conclusion that the district court had both the jurisdiction and the power to direct by injunctive order *NOPSI*'s compliance, we conclude that the enforcement function in this case would be better carried out administratively by the compliance agencies.* * *

* * * * *

Though we are removing the injunctive mandate of the district court, our decision contemplates good faith negotiations between the parties, and certain issues decided herein are precluded from further negotiations. The company cannot any longer dispute its coverage under the Executive Order, nor can the company attempt to nullify the effect of the Order's application by demanding limitation-of-scope language in any contract or proposed affirmative action program that would restrict the impact of the

Order. Moreover, *NOPSI* has no valid fourth amendment objections to the Government's demands for access either to the company's facilities or to the company's books and records, nor can *NOPSI* further delay or resist compliance by insisting on merely technical or unnecessary procedural niceties.

In *MP&L*, the court explicitly incorporated the *NOPSI* decision and emphasized (Pet. No. 77-605 App. A11-A12):

Our decision as to the merits of this case has the practical effect of an order, and we see no reason to compel the company's compliance under threat of our contempt power * * *. Our remedial tack today is premised on the assumption that *MP&L* will now comply fully, promptly and in good faith with Executive Order 11246, in accordance with this opinion and with *NOPSI*. We remind the company that any further delay would be intolerable.

ARGUMENT

1. Programs barring discrimination by government contractors began with an Executive Order issued by President Roosevelt in 1941 and have been regularly reissued in one form or another since that time.¹⁰ Executive Order No. 11246, at issue here, was promulgated in 1965.¹¹ Every appellate court that has

¹⁰These programs are summarized in the *NOPSI* opinion (Pet. No. 77-497 App. 75a-76a), and in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159, 168-171 (C.A. 3), certiorari denied, 404 U.S. 854.

¹¹Executive Order No. 11246 was amended in 1967 by Executive Order No. 11375, 32 Fed. Reg. 14303, and superseded in part not relevant here in 1969 by Executive Order No. 11478, 34 Fed. Reg. 12985.

considered the question has concluded that Executive Order No. 11246 and its predecessors represent a valid exercise of Presidential authority. See *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Farkas v. Texas Instrument, Inc.*, 375 F. 2d 629 (C.A. 5); *Farmer v. Philadelphia Electric Co.*, 329 F. 2d 3 (C.A. 3); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Southern Illinois Builders Association v. Ogilvie*, 471 F. 2d 680 (C.A. 7).

In issuing the Executive Order, the President was exercising his responsibility for the operation of the Executive Branch (cf. *Old Dominion Branch No. 496, National Letter Carriers v. Austin*, 418 U.S. 264, 274 n. 5) by defining the terms and conditions under which it would procure goods and services from others (see *Perkins v. Lukens Steel*, 310 U.S. 113; *King v. Smith*, 392 U.S. 309). Moreover, as Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, emphasized, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." There is such congressional authorization here.¹²

The Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. 471 *et seq.*, gives the President express authority over federal

¹²The Presidential authority to establish the terms on which the government will procure services and materials from others and the congressional approval of those terms distinguish this case from *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, on which petitioners rely (Pet. No. 77-497 p. 16; Pet. No. 77-605 pp. 12-16).

procurement practices. 40 U.S.C. 486(a). Such authority includes the power to impose nondiscrimination provisions in federal contracts. *Contractors Association, supra*, 442 F. 2d at 170; *Farkas v. Texas Instrument, Inc., supra*, 375 F. 2d at 632, n. 1.¹³

More specifically, Congress has ratified the Executive Order program in Title VII of the Civil Rights Act of 1964 (78 Stat. 253, 42 U.S.C. 2000e *et seq.*) and the 1972 amendments to that Title. 42 U.S.C. (1970 ed.) 2000e-8(d) provided in part:

Where an employer is required by Executive Order 10925, issued March 6, 1961 [the predecessor of Executive Order No. 11246], or by any other Executive Order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the [Equal

¹³Petitioner MP&L incorrectly suggests (Pet. No. 77-605 pp. 11-17) that the Federal Property Act authorizes only actions designed to reduce the costs caused by inefficient procurement systems. The courts, correctly we submit, have not read the statute so narrowly. In *Contractors Association, supra*, 442 F. 2d at 170, the court concluded that the Act authorized the Executive Order because "it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen." The courts of appeals in *Rossetti Contracting Co. v. Brennan*, 508 F. 2d 1039, 1045 n. 18 (C.A. 7), and *Northeast Construction Co. v. Romney*, 485 F. 2d 752, 760 (C.A.D.C.), concluded that the Federal Property Act provides authority for the Executive to try to achieve the social and economic goal of eliminating employment discrimination, without the necessity of directly linking that goal to the cost or quality of the goods procured.

Employment Opportunity] Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

The 1972 amendments provide instead for Commission consultation and coordination with "other interested State and Federal agencies," and the exchange of information with such agencies (42 U.S.C. (Supp. V) 2000e-8(d)). The amendments thus evidently assume the continued existence and enforcement of the Executive Order equal employment programs.¹⁴ Indeed, Congress rejected an effort to make Title VII the exclusive federal remedy for employment discrimination (see 110 Cong. Rec. 13650-13652 (1964)), and instead left intact alternative remedies to help eliminate discrimination. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48; *Sanders v. Dobbs Houses, Inc.*, 431 F. 2d 1097, 1100 (C.A. 5), certiorari denied, 401 U.S. 948.¹⁵

¹⁴That assumption is also reflected in the designation of the Secretary of Labor as a member of the Equal Employment Opportunity Coordinating Council established by 42 U.S.C. (Supp. V) 2000e-14 to remedy a perceived inadequacy of coordination between the contract compliance program under the Executive Order and the Equal Employment Opportunity Commission (see 118 Cong. Rec. 1398-1399 (1972)). There is a further recognition of the Executive Order program in 42 U.S.C. (Supp. V) 2000e-17, which requires an administrative hearing before the termination of a government contract under "any equal employment opportunity law or order" if the employer's affirmative action program has been approved by the government within the prior twelve months.

¹⁵In successfully opposing an amendment that would have eliminated some of the remedies available to victims of employment discrimination, Senator Williams, one of the floor managers of the bill that was ultimately enacted, stated (118 Cong. Rec. 3372 (1972)):

Furthermore, Mr. President, this amendment can be read to bar enforcement of the Government contract compliance program, at least, in part. I cannot believe that the Senate would do that after all the votes we have taken in the past 2 to 3 years to continue that program in full force and effect.

2. Petitioners are subject to the provisions of the Executive Order because they are parties to government contracts as that term is defined by the regulations issued pursuant to the Order. See 41 C.F.R. 60-1.3, 60-1.4(e) (Pet. No. 77-605 App. A101, A109). Each petitioner supplies several government agencies with utility services having an aggregate total value exceeding \$10,000 annually, and therefore does not qualify for the regulatory exemption for small contracts afforded by 41 C.F.R. 60-1.5(a)(2) (Pet. No. 77-605 App. A110). The supply of utility services is specifically listed as a type of government contract covered by the Order. 41 C.F.R. 60-1.3 (Pet. No. 77-605 App. A101). The agreements pursuant to which petitioners supply utility services to government agencies were either entered into or modified after the effective date of the Order, and modification of an existing agreement constitutes a contract subject to the Order. See 41 C.F.R. 60-1.3 (Pet. No. 77-605 App. A101).

Petitioners seek to avoid the requirements of the Order on the grounds that they have no contracts with the government that expressly contain the equal employment opportunity clause of the Order and that they have refused to consent to such a clause.¹⁶ Section 60-1.4(e) of the regulations issued by the Secretary of Labor specifically negates this position by providing that, by

¹⁶Petitioner MP&L also contends (Pet. No. 77-605 pp. 19-23) that the United States has no authority to enforce by judicial process the provisions of the Executive Order. This contention is meritless. It is well settled that the United States can enforce its contracts in court without the need for specific authorization by Congress. See, e.g., *Rex Trailer Co. v. United States*, 350 U.S. 148; *Cotton v. United States*, 11 How. 229, 230. See also *United States v. Frazer*, 297 F. Supp. 319 (M.D. Ala.), holding that the United States may sue to enforce federal regulations setting the terms and conditions under which a state may spend federal grant funds.

operation of the Order, the equal opportunity clause is included in every contract required to include the clause, whether the contract is written or unwritten and "whether or not it is physically incorporated in such contracts." 41 C.F.R. 60-1.4(e) (Pet. No. 77-605 App. A109).

Section 60-1.4(e) is a reasonable exercise of the authority delegated to the Secretary of Labor by Section 201 of the Executive Order (Pet. No. 77-605 App. A79), which directs the Secretary to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes" of the Order. The regulation does not conflict with any provision of the Order and is reasonably designed to further the Order's purpose of prohibiting discrimination by those with whom the government does business. Accordingly, it has the force and effect of law. Cf. *Mourning v. Family Publications Service*, 411 U.S. 356, 369; *Peters v. Hobby*, 349 U.S. 331, 345; *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349.

Section 60-1.4(e) is essential to the achievement of the purposes of the Order, where the government is doing business with monopolies or near-monopolies such as petitioners here. The government has no realistic alternative other than to do business with these companies, and to pay them millions of dollars annually for services rendered. See pp. 4, 6-7, *supra*. It would be directly at odds with the Order's purpose if, by refusing to consent to the equal opportunity provision, such employers were allowed to benefit from doing business with the government and at the same time to disregard the equal opportunity requirements imposed by the Executive Order as a condition of doing such business.

Section 60-1.4(e) is consistent with previously approved government contracting practices. The government has the right to prescribe the terms and conditions on which it will do business with others, provided such terms and conditions are not arbitrary or unreasonable and they are imposed on all in similar circumstances. *Perkins v. Lukens Steel, supra*. Consent to such conditions is not necessary. Congress has often provided by statute that certain obligations in furtherance of social goals be included in government contracts.¹⁷ And, in various situations where applicable regulations require the inclusion of a contract clause in every contract, courts have held the clause to be incorporated and enforceable even if it was not agreed to by the parties. *G. L. Christian and Associates v. United States*, 312 F. 2d 418, 424 (Ct. Cl.); *M. Steinthal & Co. v. Seamans*, 455 F. 2d 1289, 1304 (C.A. D.C.); *J. W. Bateson Company, Inc. v. United States*, 162 Ct. Cl. 566, 569. See also *Russell Motor Car Co. v. United States*, 261 U.S. 514, 524; *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61; *College Point Boat Corp. v. United States*, 267 U.S. 12.

3. The Executive Order and implementing regulations require that government contractors allow the government reasonable access to their records to determine if the contractor is complying with the equal employment opportunity requirements of the Order (see p. 3, *supra*). This requirement, like the agreement not to discriminate, is part of the equal opportunity clause incorporated into every government contract by operation of the Executive Order (Section 202 of the Order, Pet. No. 77-497 App.

¹⁷See, e.g., the Walsh-Healey Act, 49 Stat. 2036-2038, as amended, 41 U.S.C. 35, 36, 40; Davis-Bacon Act, 49 Stat. 1011, 40 U.S.C. 276a-1; Buy American Act, 47 Stat. 1520, 41 U.S.C. 10b.

115a; 41 C.F.R. 60-1.4(a) and (e), Pet. No. 77-497 App. 136a, 141a). Petitioners contend (Pet. No. 77-497 pp. 24-33; Pet. No. 77-605 pp. 23-27) that, as applied to them, the access provisions violate the Fourth Amendment's prohibition against unreasonable searches and seizures.¹⁸ This contention is without merit.

Petitioners' reliance on this Court's decisions in *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541, is misplaced. Neither of those cases, nor any other authority cited by petitioners, involved situations in which the owner of the records sought to be inspected is a government contractor who is required to permit reasonable inspection of these records during business hours as a condition of doing business with the government, in order to assure his compliance with the provisions of the contract.¹⁹

¹⁸The requirement that government contractors such as petitioners must furnish reports required by the Executive Order and the regulations is not here in dispute. Cf. *California Bankers Assn. v. Shultz*, 416 U.S. 21, 57-70.

¹⁹We have discussed the relationship of *Camara* and *See* to *United States v. Biswell*, 406 U.S. 311, upon which the court below relied in upholding the inspection requirement (Pet. No. 77-497 App. 87a), in our brief in *Marshall v. Barlow's*, No. 76-1143, filed July 26, 1977. We agree with the court of appeals that the inspection here, like that in *Barlow's*, is closer to the inspections approved in *Biswell* than to those in *Camara* and *See*. But whatever limitations the Fourth Amendment may place on warrantless inspections designed to assure compliance with regulatory programs, the government may require its contractors to submit to inspections it deems necessary to assure compliance with the contract conditions. The principles supporting the incorporation of the substantive agreement into contracts regardless of the contractor's consent equally support the incorporation of the clause permitting inspections.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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